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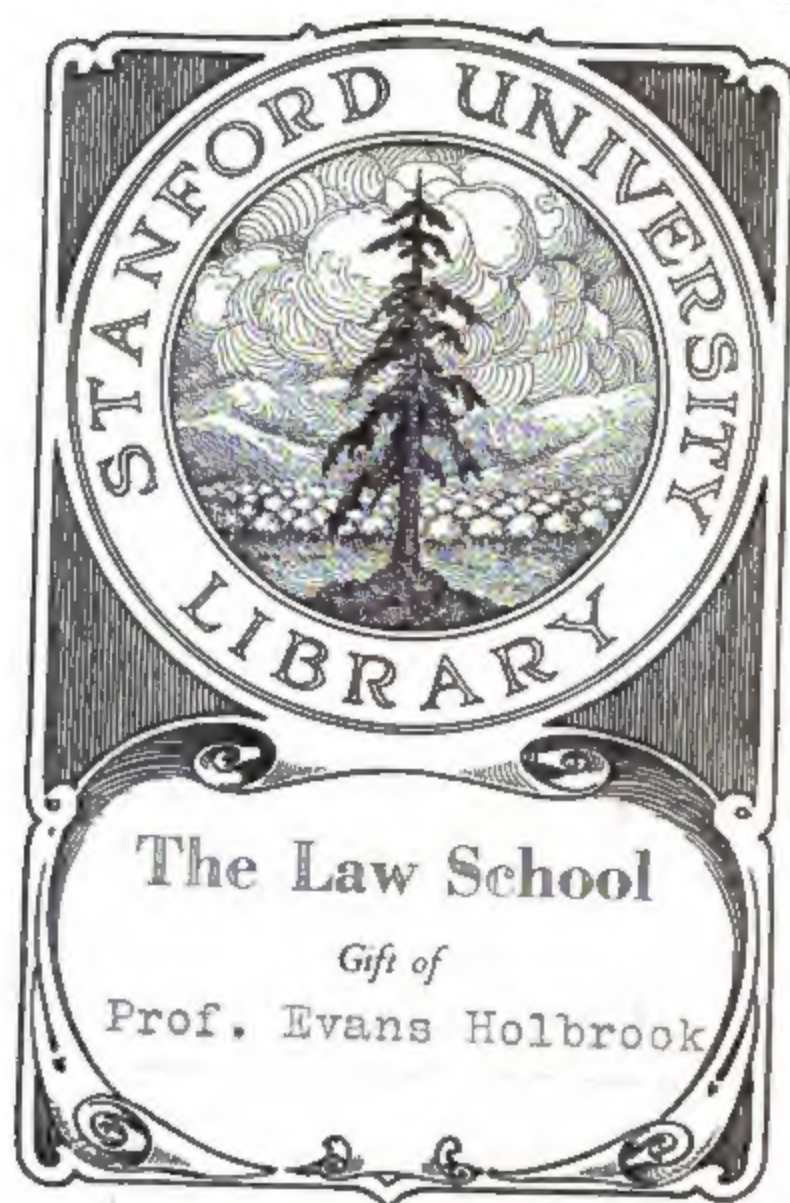
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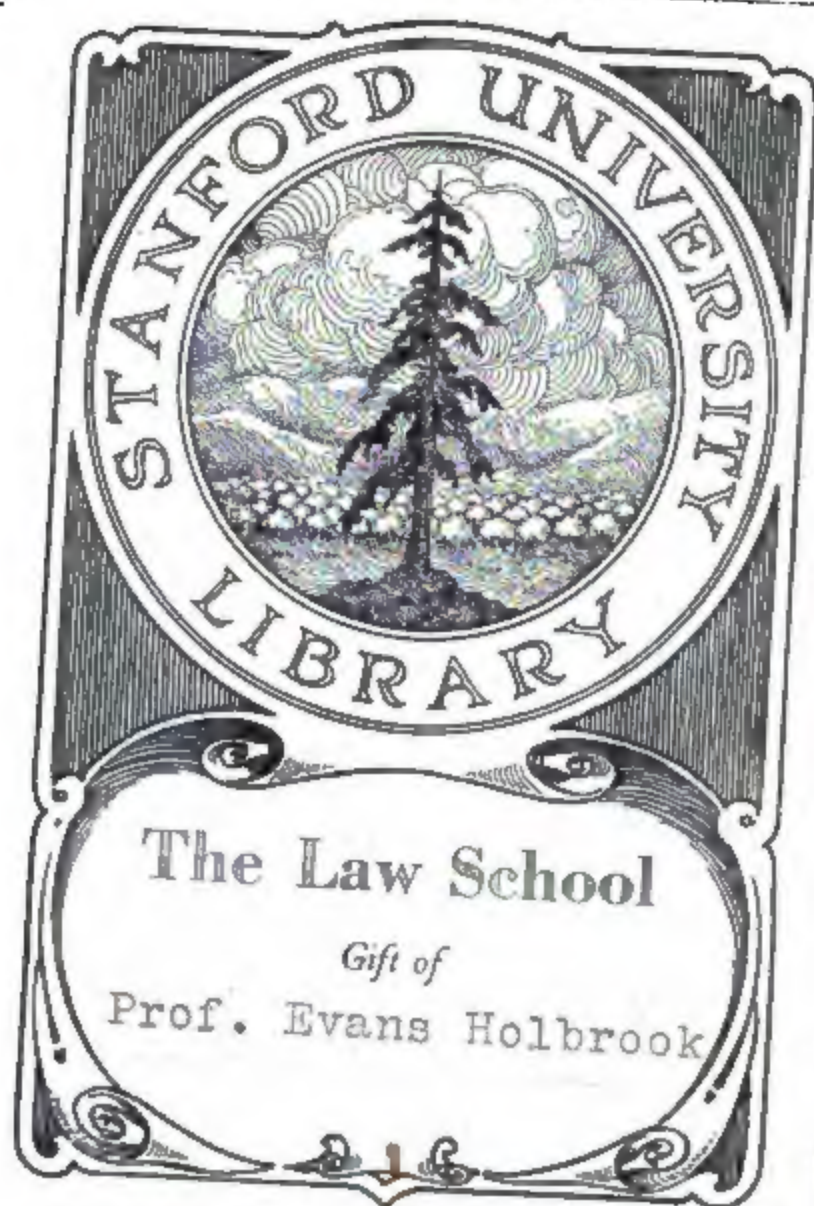
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**PLEADING AND PRACTICE**  
**OF**  
**THE HIGH COURT OF CHANCERY,**

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**EDMUND ROBERT DANIELL, F. R. S.,**  
**A COMMISSIONER OF THE COURT OF BANKRUPTCY.**

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**IN THREE VOLUMES.**

**VOL. III**

**WILLIAM B. E. LITTLE, JR.**

**BOSTON:**

**LITTLE, BROWN, AND COMPANY.**

**1865.**

Entered according to Act of Congress, in the year 1865, by  
J. C. PERKINS,  
in the Clerk's Office of the District Court of the District of Massachusetts.

**350664**

YNA 981.1 09071812

UNIVERSITY PRESS: WELCH, BIGELOW, & Co.,  
CAMBRIDGE.

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**THE PRACTICE**  
**or**  
**THE HIGH COURT OF CHANCERY.**  
**VOLUME III.**



## CHAPTER XXXVII. OF INTERLOCUTORY APPLICATIONS.

### SECTION I. — *General Nature of.*

AN *interlocutory* application is a request made to the Court, either orally or in writing, for its interference in a matter arising in the progress of the cause, whether before it has been brought to a hearing, or afterwards, in consequence of the decree or order made upon such hearing; and it may either relate to the process of the Court, or to the protection of the property in litigation *pendente lite*, or to any matter upon which the interference of the Court is required before or in consequence of a decree or decretal order.

Interlocutory applications are extremely various, and the occasions upon which they may be made are too numerous to be discussed in a general Treatise of this nature; all, therefore, that can now be done is, to direct the reader's attention to some of the most important occasions upon which such interlocutory applications are made, to point out the course of practice upon each, and to lay some of the general rules concerning such applications.

Applications of this nature, when made *vivâ voce*, to the Court, are called *motions*; when they are made in writing, they are called *petitions*.

The occasions when a petition is regular, or when an application by motion should be adopted, are in general sufficiently well understood in practice, though no very distinct line of demarcation can be laid down.<sup>1</sup>

Thus it is not usual to order money to be paid out of Court on motion, as the general recitals in a petition, which must be justified by the proceedings to warrant the drawing up of the order,

<sup>1</sup> This applies only to applications *in a cause*, where the application is made on behalf of infants, or under the statutory jurisdiction it must be by petition, unless otherwise directed by the statute under which the application is made. But where the application is upon some collateral matter, which has reference to a suit in Court, a party may be relieved upon petition. *Codwise v. Gelston*, 10 John. 508. A petition is the proper course to obtain a reversal of an interlocutory decree, wrongfully made, the cause yet pending. It cannot be done on motion, or bill of review. *Wilcox v. M'Lean*, 2 Hayw. 175.

always speak for themselves, at any distance of time.<sup>1</sup> In like manner, the practice has been that applications for orders, which partake more of the nature of decrees or of decretal orders than of interlocutory proceedings, such, for instance, as applications for the appointment of guardians, and for the allowance of maintenance for infants, should be made by petition;<sup>2</sup> and so, in general, must all applications to the Court, upon matters arising out of decrees or decretal orders, except those relating to the process of the Court or for enforcing the performance of them, which are usually made upon motion.<sup>3</sup>

With respect to the Judge before whom motions and petitions are to be heard, the following Order is explicit as to all causes, motions and petitions. By the 7th Order of the 29th of October, 1851, "All motions, petitions and further proceedings in causes and matters are to be heard before the Judge to whose Court the same are respectively attached, unless removed therefrom by any special order of the Lord Chancellor."

Moreover, by the 5th Order of the 11th November, 1841, "All motions, petitions and further proceedings in causes in the Lord Chancellor's Court, except any motions or proceedings which were then part heard, shall be had before the Judge to whose Court the cause shall, under the provisions of those Orders, be attached, unless removed therefrom by any special order of the Lord Chancellor."<sup>4</sup>

And the 6th of the same Orders directs, "That all notices of motion not in any cause, and all petitions not in any cause, which are presented to the Lord Chancellor, shall be marked with the

<sup>1</sup> See *Lord Shipbrooke v. Lord Hinchinbrooke*, 13 Ves. 394; *Garratt v. Niblock*, 5 Beav. 143.

<sup>2</sup> Many of these applications, as we have before seen, are now made in chambers.

<sup>3</sup> Where an order to stay proceedings in a cause pending in this Court is proper, the party must apply to the Court by petition. *Dyckman v. Kernochan*, 2 Paige, 26. And maintenance will be allowed to an infant, out of the capital of his estate, upon petition without bill. *Matter of Bostwick*, 4 John. Ch. 102. A petition is the proper process to affect a fund in Equity, when no other parties are to be brought in to litigate the questions presented by it than such as are or ought to have been parties to the original bill. *Hayes v. Miles*, 9 Gill & John. 193. It is not, however, all cases in which a petition is the proper course to reach a fund in Court. *Ib.* See *Tally v. Tally*, 2 Dev. & Bat. Eq. 385; *ex parte Quackenboss*, 3 John. Ch. 408.

<sup>4</sup> *Goodale v. Gawthorn*, 1 Mac. & Gor. 319.

title of one of the Vice-Chancellor's, and shall thenceforth be attached to such Vice-Chancellor's Court, unless removed therefrom by any special order of the Lord Chancellor."

The foregoing Orders determine before what Judge of the Court any interlocutory application should be made during the sittings of the different Courts. During the vacations the strictness of these rules is relaxed, for the 15th Order of the 5th of May, 1837, directs, "That in the interval between the close of the sittings after any Term, and the commencement of the sittings before or at the beginning of the next ensuing Term, applications for special orders may be made to any Judge of the Court, in the same manner as if those orders had not been made; but that the orders which shall be made in any such interval by the Lord Chancellor, or by the Master of the Rolls, or by the Vice-Chancellor, shall, if not made by the Judge to whom the application, if made during the ordinary sittings of the Court, would have been made pursuant to the directions contained in these orders, be marked as having been made for such Judge, and shall, in the future proceedings of the cause, be deemed to be the order of such Judge in all respects save this, that no order so made by one Judge for another, under the circumstances aforesaid, shall be reheard for the purpose of being discharged, or varied otherwise than by the Lord Chancellor."

This last Order was made before the two additional Vice-Chancellors were created, but an Order of the 5th of August, 1842, extends the benefit of its provisions to all the Judges, directing, "That the said 15th Order of the said 5th of May, 1837, shall extend to applications for special orders to be made, in the interval therein mentioned, to, and also to orders to be made in such interval by, any Judge of the Court of Chancery as the Court is now constituted; and that, subject to the provisions of the said 15th Order of the 5th of May, 1837, the said 5th Order of the 11th of November, 1841, shall not extend to applications and orders to be made in such interval as aforesaid."

## SECTION II.

*By Motion.*

A MOTION is an application either by a party to the suit, or his counsel, not founded upon any written statement addressed to the Court.<sup>1</sup>

A motion may be made by or on behalf of any of the parties to the record, provided such party is not in contempt;<sup>2</sup> it is not usual for an individual, who is not a party to the record, to be heard to make an application by motion; thus it has been held, that when a receiver has occasion to apply to the Court, he must do so by petition; but where the notice of motion shows the title of the applicant, no long statement of facts is necessary for that purpose; it seems that a person not a party to the suit may apply by motion.<sup>3</sup> A similar privilege is conceded to a person who is *quasi* a party to the record, such as a creditor coming in under a decree, or a purchaser of an estate sold by order of the Court.

A motion is either *of course*, that is, for an order which, by some standing rule or known practice of the Court, may be granted without hearing both sides;<sup>4</sup> or, 2dly, special, *i. e.*, for an order

<sup>1</sup> A motion can only be repeated on new grounds, and not upon mere additional or cumulative papers. *Ray v. Conners*, 3 Edw. Ch. 478; *Fenton v. Lumberman's Bank*, 1 Clarke, 360; *Hoffman v. Livingston*, 1 John. Ch. 211.

<sup>2</sup> See *Johnson v. Pinney*, 1 Paige, 646; *Rogers v. Paterson*, 4 Paige, 450; *Lane v. Ellzey*, 4 Hen. & Munf. 504; 1 Smith Ch. Pr. (2d Amer. ed.) 62, note (a).

<sup>3</sup> *Jones v. Roberts*, 12 Sim. 189; *Earl of Portarlington v. Damer*, 2 Phil. 264.

<sup>4</sup> The term "order of course" is frequently used as if it were confined exclusively to such orders as are drawn up by the subordinate officers of the Court, without any direct application to the Judge. It seems, however, that the term "order of course" is not thus confined in its meaning, but that it includes any order that is granted by the Court as a matter of course, upon the Court being satisfied by affidavit of the truth of some particular facts, specified either by the General Orders or practice of the Court, as the foundation of such an order. As the term "order of course" is used in the General Orders, the precise meaning of it may be important. By the Equity Rules of the Supreme Court of the United States, all motions, rules, orders, and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed, — which book shall be open at all office hours, to the free inspection of the parties in any suit in Equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice

which is not a mere matter of course and can only be granted under special circumstances, or upon notice duly served upon the opposite party.

A motion of course requires<sup>1</sup> no notice, as no opposition will be allowed to it,<sup>2</sup> but if it is obtained upon a false suggestion, it may be set aside upon application by *special* motion.

It is to be observed, that many orders which are obtained upon motions of course, can also be obtained upon petitions of course. The expense, however, of obtaining an order of this kind, upon petition to the Chancellor, has rendered the practice unusual. But we shall hereafter see<sup>3</sup> that great facilities are given for the purpose of enabling orders of this kind to be made upon petitions to the Master of the Rolls; the effect of which is, that the practice has become general for orders of course, even in causes attached to the Vice-Chancellors' Courts, to be granted upon petitions addressed to the Master of the Rolls.

Formerly, although motions of course might be made any day in term, they could not be made out of term, except on a seal day. This rule has, however, been abolished, and now they may be made out of term as well as in term, on any day, whether a seal day or not.<sup>4</sup>

Those motions of course, which are granted without the Court being called upon to investigate the truth of any allegation or suggestion upon which they are founded, are not now usually mentioned in Court, but it is the general practice for the counsel to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits, to and in which they are parties and solicitors. Rule 4.

<sup>1</sup> 1 Newl. 143.

<sup>2</sup> Ibid. and see *Eyles v. Ward*, Mos. 255.

<sup>3</sup> See post, pp. 1710, 1711.

<sup>4</sup> *Lord Harborough v. Wartnaby*, 1 Ph. 365; see, however, *Radburn v. Jervis*, 6 Beav. 357. By the 5th Equity Rule of the United States Courts, all motions and applications in the clerk's office for the issuing of mesne and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office, which do not by special provision require any allowance or order of the Court, or of any Judge thereof, shall be deemed motions and applications grantable of course by the clerk of the Court. But the same may be suspended, or altered, or rescinded by any Judge of the Court, upon special cause shown. See Chancery Rule of New Jersey, XIV. § 1.

to sign the brief or motion paper, adding the date to the signatures, and to hand them to the Registrar in Court, who enters them in his book, and then returns the brief or motion paper, to the counsel. After an order of course has been obtained, it ought to be served as soon as possible upon the party intended to be affected by it, or his solicitor; for although it does not seem that an order of course is absolutely no order until it is served (as it has been contended), yet if the other party takes a step before the order is served, that step being in itself regular, the order which had been obtained and not served cannot afterwards be acted upon, if it will interfere with the step so taken.<sup>1</sup>

The brief thus signed should be taken to one of the clerks of the Registrars, who draw up orders of this description. It is left with him to be passed by the Registrar, who signs his initials at the foot. These orders are passed without notice to the other side. The fee is five shillings, payable by a stamp. The order when passed is left with the clerk of the entries. There is a general statutory power given by the 13 & 14 Vict. c. 35, s. 29, in the following words:—“It shall be lawful for the Master of the Rolls and the Vice-Chancellor respectively to discharge, reverse or alter any order made on motion or petition of course, by any other of them, or by the Lord Chancellor.” It has for a long time been the practice to make orders of course upon petition at the Rolls in causes not attached to that Court, and upon the enactment it was necessary to move at the Rolls Court to discharge orders of this description made in causes not attached to the Rolls Court. Now, by the 26th Order of November, 1850, “applications to discharge, reverse or alter any order made on motion or petition of course by the Lord Chancellor, the Master of the Rolls, or one of the Vice-Chancellors, are to be made to the Judge, to whom special applications in the cause or matter in which such order is made ought to be made, according to the practice of the Court, and the General Order applicable thereto.”<sup>2</sup>

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A special motion is one which it is not a matter of course to grant, but which the Court, in the exercise of its discretion, may, on the facts established in support of the application, either grant or refuse.

<sup>1</sup> Church v. Marsh, 2 Hare, 652.

<sup>2</sup> Cooper v. Knox, 15 Beav. 102; Gearsley v. Gearsley, 19 Beav. 1.

Motions of this description may be made either *ex parte*, or upon notice.

When they are made *ex parte*, as in the case of motions for a *ne exeat regno*, or for an injunction, they must be supported by the affidavit of the party applying for them, and by such collateral affidavits as may be necessary to make out a sufficient case for the interference of the Court.

The object of motions of this nature is generally to prevent the performance of some act which, if performed, might be productive of irreparable injury.

*Ex parte* motions are not limited to the ordinary motion days, but may be made to the Court at any time during its sittings; or, if the Court be not sitting, they may be made to one of the Judges, at his private house.<sup>1</sup> In such cases, however, care must be taken to make the motion before the Judge who has properly the cognizance of the cause, unless it be made during the vacation.<sup>2</sup>

It is impossible to lay down any clear rule defining such motions as may be made *ex parte*, and distinguishing them from such as require notice. The General Orders usually state with respect to any application to be made under their provisions, whether it requires notice or not; and special applications concerning the proceedings in the cause, not regulated either by the General Orders, or by any clearly-defined rule of practice, must almost always be made upon notice.<sup>3</sup>

Where an order is made by which a particular act is to be done, unless the other party shall within a certain time show cause to

<sup>1</sup> By the 6th Equity Rule of the United States Courts, all motions for rules, orders, and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a Judge of the Court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that in which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any Judge of the Court *ex parte*, and granted, as if not objected to, or refused, in his discretion. See Chancery Rule of New Jersey, XIV. § 1.

<sup>2</sup> See ante, p. 1694.

<sup>3</sup> *Marshall v. Mellersh*, 5 Beav. 496. Notice of every application to the Court must be given to the opposite party, in case he has appeared, where the motion relates to any matter pending in Court, or where a final order is sought, orders for time, and those of a like nature only excepted; otherwise the applicant will only be entitled to an order *nisi*. *Isnard v. Cazeaux*, 1 Paige, 39; *Hart v. Small*, 4 Paige, 551.

the contrary, (which order is generally termed an order *nisi*,) the party obtaining the order must, after the expiration of the time limited by the order *nisi*, if no cause is shown, move for another order to confirm the previous order *nisi* absolute. The motion, in this case, requires no notice, but the application must be supported by an affidavit to prove the due service of the order *nisi*, either upon the party himself, when such service is required to be personal, or upon his solicitor, where personal service is not required or has been dispensed with.

In the case of *Dobede v. Edwards*,<sup>1</sup> an order was made that a cause should stand over, with liberty to the plaintiff to amend within a month, and, on his making default, that the bill should be dismissed with costs. The plaintiff made default, whereupon the defendant obtained an order to dismiss without notice, and it was held that the order was regularly obtained without notice.

When the application to be made to the Court is not of course, or does not come within that class of special applications which the Court permits to be made *ex parte*, the general practice requires that a statement in writing of the terms of the motion should be served upon the adverse party or his solicitor, a certain number of days before the day on which the motion is intended to be made. This statement, in writing, is termed a *notice of motion*.

Special motions not requiring notice, and not likely to occupy much time, may be made on any day in term,<sup>2</sup> at the rising of the Court after the causes are heard; but the Court generally appoints one day in every week, during term, for the hearing of motions in general; this day is usually Thursday, except it happens to be the second day in term, or the last day, save one, of the end of the term; in which case, as the first and last days of term are always devoted to motions only, no other motion day is appointed in the weeks in which those days occur.

In the vacation, the only regular motion days are—the seal days, which are appointed after every term; and no special motion requiring notice can be made after the termination of the last seal after term, till the first day of the next term, or the first general seal before it, unless upon special leave of the Court first obtained, authorizing the party to give notice of the intended motion; when,

<sup>1</sup> 11 Sim. 454.

<sup>2</sup> *Chaffers v. Baker*, 5 De G., Mac. & Gor. 482; see *Murray v. Blatchford*, 2 Wendell, 221.

also, a special motion is required to be made during the sittings of the Courts after term, at one of the intervals between the seals, or when during term a motion of importance is required to be made on any day, not being the first or last day of term, or one of the days usually appropriated to motions, special leave must be obtained to give notice of the motion for that day, and the fact of such special leave having been obtained, must be stated in the notice of motion.

*A notice of motion* must be properly entitled in the cause in which the application is to be made :<sup>1</sup> it must be addressed to the solicitor of the party or parties intended to be affected by it, or to the party himself where personal service is intended ; and it must bear the signature of the solicitor, or firm of the solicitor of the party moving. A notice of motion by a party suing or defending *in formâ pauperis*, must be signed by the solicitor of such pauper.<sup>2</sup>

It must state the day on which the motion is to be made,<sup>3</sup> which, if in term, may, as we have seen, be on any day in term ; although, unless the application is a mere matter of course, or is to be consented to, it cannot be made till one of the days appointed for motions ; out of term, it must be a general seal day, unless special leave has been obtained to give the notice of motion for another day. The notice, however, though it generally expresses the day when the motion is to be made, usually adds, “ *or as soon after as counsel can be heard.*”

It is to be observed, that whenever a motion is to be made “ *by leave of the Court,*” the notice ought to mention that it is so made, otherwise the party against whom it is to be made may disregard it.<sup>4</sup>

A notice of motion must state clearly the terms of the order asked for.<sup>5</sup>

The Court will not, ordinarily, extend the order made, upon a motion, beyond what is expressed in the notice ; as where the notice was, that the Court would be moved that the plaintiff might

<sup>1</sup> Rowlatt v. Cattell, 2 Hare, 186.

<sup>2</sup> 16th Order of October, 1842 ; Perry v. Walton, 4 Beav. 452.

<sup>3</sup> Bodwell v. Wilcox, 2 Caines, 104 ; Anon. 1 John. 143 ; Smith Ch. Pr. (2d Am. ed.) 64, note (a).

<sup>4</sup> Hill v. Rimell, 8 Sim. 632.

<sup>5</sup> Brown v. Robertson, 2 Phil. 173. See Alexander v. Easten, 1 Caines, 152 ; Jackson v. Stiles, 1 Cowen, 134, 135, note ; 1 Smith Ch. Pr. (2d Am. ed.) 64, note (a).

be put into possession, and a receiver appointed, the Court, though the defendant did not oppose the motion, would not direct that nothing should be received by the defendant in the meantime;<sup>1</sup> it is therefore necessary, that everything the party wishes to be obtained upon his motion should be expressed in the notice, otherwise the Court will not grant it.

The costs, however, of a motion may be given, though they are not asked for by the notice.<sup>2</sup>

It is to be observed, that several objects may be included in the same notice of motion; such as the appointment of a receiver, and an injunction and the payment of money into Court;<sup>3</sup> or the appointment of a receiver, and payment of money into Court, and the production of papers.<sup>4</sup> And in some cases, where separate motions are made for two objects, which might have been obtained by one motion, the Court has made a special order, directing the party making such motions to pay the extra costs occasioned by the irregular proceeding.<sup>5</sup>

A notice of motion on behalf of a pauper should be signed by his solicitor.<sup>6</sup>

A motion in an information is on behalf of the Attorney-General, and not on behalf of the relator.<sup>7</sup>

No person may join in a notice of motion who is not interested in the result of the application; and so strictly is this rule adhered to, that where the name of an uninterested party is inserted in the notice, with the names of others who are entitled to apply, the Court has refused the whole motion.<sup>8</sup>

If it is intended, upon making the motion, to read any affidavits which have been already filed in the cause, such intention ought, in strictness, to be mentioned in the notice of such motion, otherwise the respondent would not have any intimation that such affidavits were to be read, the rules of the Court not requiring him to search for affidavits further back than the date of the notice of

<sup>1</sup> Prac. Reg. 287.

<sup>2</sup> *Clark v. Jacques*, 11 Beav. 623; *Buller v. Gardiner*, 12 Beav. 525. See *Crippen v. Ingersoll*, 10 Wend. 603; *Bates v. Loomis*, 5 Wend. 78.

<sup>3</sup> *Lumsden v. Fraser*, MSS. V. C. Nov. 1837.

<sup>4</sup> *Brown v. Keating*, MSS. Rolls, July, 1840.

<sup>5</sup> *Hawke v. Kemp*, 3 Beav. 288.

<sup>6</sup> *Perry v. Walker*, 4 Beav. 452.

<sup>7</sup> *Attorney-General v. Wright*, 3 Beav. 447.

<sup>8</sup> *Folland v. Lamotte*, 10 Sim. 486.

motion. But though, in strictness, the affidavits ought to be mentioned in the notice of motion, a separate notice of the intention of the mover to read them, duly served, will be sufficient.<sup>1</sup>

All notices of motion for any process of contempt or commitment must be served *personally* upon the party to be affected by it, unless an order had been previously obtained for substituted service.

If any of the persons upon whom the notice of motion is sought to be served should be out of the jurisdiction of the Court, leave must be obtained, upon special application, before service upon them can be effected.

The 3d Order of April, 1842, provides for the case of a defendant who has not appeared within due time, and directs, that "The plaintiff shall, without special leave of the Court, be at liberty to serve any notice of motion or other notice or any petition, personally, or at the dwelling-house or office of any defendant who, having been duly served with *subpæna* to appear to and answer the bill, shall not have caused an appearance to be entered by his own solicitor or in person, at the time for that purpose limited by the General Orders of the Court." The service of a *subpæna* has been abolished, but probably the same practice will prevail with respect to the service of a copy of a bill.

If personal service upon the party is not necessary, a notice of motion may be served upon his solicitor.<sup>2</sup> And, as we have seen in the 44th Order of 1828, whenever a person *who is not a party* appears in any proceeding, service upon the solicitor in London by whom such party appears, whether such solicitor acts as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service.<sup>3</sup>

By the 47th Article of the 16th Order of May, 1845, "There must, unless the Court gives special leave to the contrary, be at least two clear days between the service of a notice of motion, and the day named in the notice for hearing the motion, and at least

<sup>1</sup> In New York, copies of every petition, affidavit, &c., upon which the motion was founded, were required to be served, together with the notice of the motion. *Isnard v. Cazeaux*, 1 Paige, 39; Rule 89, in Chancery; *Brown v. Ricketts*, 2 John. Ch. 425. As to scandal and impertinence in papers prepared for making or opposing a motion, see *Powell v. Kane*, 5 Paige, 265; ante, p. 1689, note.

<sup>2</sup> Ante, p. 428 *et seq.*

<sup>3</sup> The respondents in a charity petition are parties to it, and, therefore, not within this order. *In re Willoughby's Charity*, 6 Sim. 18.

two clear days between the service of a petition and the day appointed for hearing the petition, but in the computation of such two clear days, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, are not to be reckoned.”<sup>1</sup>

By the 5th Order of May, 1845, “The several offices of the Court, except the office of the Accountant-General and of the Masters in ordinary and Taxing Masters, are to be open on every day of the year except Sundays, Good-Friday, Monday and Tuesday in Easter week, Christmas-Day, and all days appointed by proclamation to be observed as days of general fast or thanksgiving.”

In addition to the days during which the other offices of the Court are closed, the offices of the Accountant-General, Masters in ordinary, and Taxing Masters are closed in vacations. For by the 6th Order, “The offices of the Accountant-General and of the Masters in ordinary and Taxing Masters are to be open on every day of the year, except the day specified in Order 5, and except during vacations.”<sup>2</sup>

By the 7th Order the offices of the Vacation Master in ordinary, and of the Vacation Taxing Master, are to be open during the vacations on every day except the day specified in Order 5.

Service of a notice of motion is effected by delivering a true copy of the notice to the individual on whom the service is made, who, if the service be not personal, is the solicitor of the party.

The individual who serves the notice should, after serving it, make an affidavit of the service, to be used in case the party served should not appear when the motion is made. And it is to be observed, that, in an affidavit of this nature, it is not enough to say that notice was given, or the copy delivered to the party's solicitor,

<sup>1</sup> By the 22d Order of October, 1842, the notice must be served before eight o'clock in the evening. *Newton v. Chorlton*, 10 Hare, App. 31; *Hart v. Tulk*, 6 Hare, 611. See *Vandenburgh v. Van Rensselaar*, 6 Paige, 147.

<sup>2</sup> For the length of the vacations in general, see ante, p. 417; but it may here be observed, that the term “vacation,” as applied to the office of the Accountant-General, has a slightly different meaning to what it has when applied to the other offices. For the 9th of the same Orders directs, “That the vacations in the office of the Accountant-General are to be the same as in the other offices, except as to the long vacation, which in that office is to commence and terminate on such day as the Lord Chancellor shall every year direct.” By the 10th of the same Orders power is given to the Lord Chancellor to order the offices to be closed on particular days, and to vary the periods of vacation.

but his name should be expressly mentioned, that it may appear, with certainty, to whom notice was given, and it must say — “ *Notice in writing*,” or words to that effect.<sup>1</sup>

The affidavit of service ought to be made and filed before the notice is made, and an officer should be in Court when the notice is made; it may, however, be filed afterwards, but no order will be drawn up on affidavit of service of motion or petition, unless it be made and filed, at the latest before the rising of the Court on the day on which the application is made.<sup>2</sup>

Where a motion is intended to be made, upon notice, against a defendant who has not appeared, and whose time for appearance has not arrived, leave to serve such notice upon him personally, must be first obtained from the Court, and mentioned in the notice of motion.<sup>3</sup>

According to the general rule of the Court, upon motion or seal days, the Judge calls upon each counsel in Court, in turn, according to their seniority, to move, and each counsel, when called upon, has a right to make two motions before the next counsel is called upon. If, upon going through the bar, all the motions are not exhausted, the same process is gone through, *toties quoties*, till all the motions are disposed of.

If a counsel is unable to make a motion, of which notice is given, on the day named, “or as soon after as counsel can be heard,” he may save his notice of motion till the next seal or motion day; but if he omits either to make the motion or to save it, the opposite party may, at the termination of the seal or at the next seal, apply for his costs of the motion.

A motion is made by the counsel to whom it is intrusted, who in making it reads the notice of motion, and the affidavits filed on behalf of the party for whom the motion is made. It is to be observed, however, that he cannot read any affidavits filed before the date of his notice of motion unless notice of his intention to read them has been duly served on the opposite party;<sup>4</sup> nor can he read any affidavit which has not been filed sufficiently long before the motion is made to enable the other side to take a copy of it.<sup>5</sup>

<sup>1</sup> Hind. 452; Prac. Reg. 9; but see *M’Cauley v. Collier*, 1 Ves. jr. 141.

<sup>2</sup> *Lord Milltown v. Stuart*, 8 Sim. 34.

<sup>3</sup> *Hill v. Rimell*, 2 M. & C. 641.

<sup>4</sup> Ante, p. 1703.

<sup>5</sup> Where original papers are used in opposition to an application, which is de-

And here it may be remarked, that it is the duty of the solicitor for the party against whom a motion is to be made to search the Affidavit Office up to the morning of the day on which the motion is to be made, to ascertain whether any affidavits have been filed : he need not, however, carry this search back beyond the day of the date of the notice.<sup>1</sup> The same thing must be done by the solicitor for the party making the motion, in order to ascertain whether affidavits have been filed on the other side. If the motion is not made on the day named in the notice, a party filing a further affidavit ought to give notice of his having done so to the opposite party, or else he should furnish him with a copy of the affidavit so filed.<sup>2</sup>

It appears that if one party gives notice of his intention to read an affidavit but declines so to do, the other side may read the affidavit.<sup>3</sup>

If an affidavit which has been filed upon or in answer to a motion requires an answer, but it has been filed so recently that an affidavit in answer cannot be procured, the party affected by it should, if he be the party moving, save his notice of motion till a future day ; or if he be the respondent, he should ask that the motion should stand over, in order that he may file another affidavit.

We have seen that powers are now given, enabling parties in any cause to obtain the evidence of witnesses upon motions and petitions in the same manner as upon the hearing of a cause.<sup>4</sup> To enable a party to the cause to act upon this power, application for that purpose should be made before the motion is brought on.<sup>5</sup>

When the counsel who makes the motion has concluded, he is followed by his junior, if he has one, after which the counsel in opposition to the motion are heard. The counsel for the party moving has then the right of reply, after which the Court pronounces its decision.

nied, the party using such papers must file them, so that the adverse party can obtain copies thereof. *Bloodgood v. Clark*, 4 Paige, 574.

<sup>1</sup> Ante, p. 1702.

<sup>2</sup> *Clement v. Griffith*, C. P. Cooper's Rep. 470 ; so also *Bent v. Reynolds*, M. R. June, 1838, *ibid*.

<sup>3</sup> *Cauty v. Houlditch*, 14 Sim. 75.

<sup>4</sup> 15 & 16 Vict. c. 86, s. 40, ante, p. 895 ; and see 36th Order of August, 1852, ante, p. 897.

<sup>5</sup> *Smith v. Swansea Dock Company*, 9 Hare, Appx. 20.

In deciding upon a motion, the Court sometimes extends its order to the costs of it; that is, if it dismisses it, it frequently dismisses it with costs, and as we have already seen, it will grant it with costs, though the costs have not been specifically mentioned in the notice of motion.<sup>1</sup>

When no order is made respecting the costs of a motion, they become subject to the rules already pointed out with reference to "*costs in the cause.*"<sup>2</sup>

If a party who is not interested in the result of a motion is served with the notice of motion, he will be entitled to the costs of appearing.<sup>3</sup>

It may be mentioned in this place, that in some cases, where a party succeeds in his motion, he will be ordered to pay the costs of it; thus, where he applies for an order which is for his own benefit, he will, in general, be ordered to pay all the other parties their costs occasioned by the application.

By an Order of the 5th August, 1818,<sup>4</sup> it is directed, "That if a party gives notice of motion and does not move accordingly, he shall, *when no affidavit is filed*, pay to the other side forty shillings costs, upon production of the notice of motion; but that, *when an affidavit is filed* by either party, the party giving such notice of motion and not moving, shall pay to the other side costs, unless the Court shall direct, upon production of the notice of motion, what sum shall be paid for costs."<sup>5</sup>

Under this Order, if a motion is not made according to the notice, the respondent must apply to the Court for his costs, according to the terms of it; and the costs cannot be granted unless

<sup>1</sup> Ante, p. 1702; *Jones v. Batten*, 10 Hare, Appx. 11; *Newton v. Chorlton*, 10 Hare, Appx. 32. See *Kane v. Van Vranken*, 5 Paige, 62; *Seebor v. Hess*, 5 Paige, 85.

<sup>2</sup> Ante, p. 1459. See *Rogers v. Rogers*, 2 Paige, 459; *Wilkinson v. Henshaw*, 4 Paige, 257. If a party succeeds in a motion, and obtains an order for costs, and no direction is given as to them, and he obtains a general decree for costs, he shall be allowed costs of the motion. *Stafford v. Bryan*, 2 Paige, 45. But this rule does not apply if the motion be granted as a mere matter of favor, or to relieve the applicant from the consequences of his own default. *Ib.* Costs should not be taxed upon overruling or sustaining a motion to dissolve an injunction. *Barnett v. Spencer*, 2 Hen. & Munf. 7.

<sup>3</sup> *Heneage v. Aiken*, 1 J. & W. 377.

<sup>4</sup> 1 Swanst. 128; 3 Mad. 318.

<sup>5</sup> See *Green v. Meares*, 14 Sim. 526, where notice of an intention to read an affidavit had been given. See *Blake v. Blake*, 2 Hogan, 190.

the notice is mentioned to the Court: nor will the order for costs be drawn up, unless the notice is produced to the Registrar.<sup>1</sup>

It is to be observed, that an order for the costs of an abandoned motion will not be made after the bill has been dismissed for want of prosecution.<sup>2</sup>

Where an order for the payment of the costs of an abandoned motion has been made, under the above Order, a renewed motion, to the same effect as the abandoned motion, cannot be made till the costs have been paid.<sup>3</sup>

The costs of an abandoned motion should be applied for at the motion day next after that on which the abandoned motion should have been made. It will be recollected that the Court may order direct payment of a sum in gross in lieu of taxed costs, and direct by whom and to whom such sum is to be paid. We have seen, that, if any party is dissatisfied with the decision of the Master of the Rolls or a Vice-Chancellor, he may apply by motion to the Court of Appeal to discharge or vary the orders.<sup>4</sup>

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### SECTION III.

#### *By Petition.*

A PETITION is the request of a person in writing, directed to the Chancellor or Master of the Rolls, showing some matter or cause whereupon the petitioner prays some direction or order.<sup>5</sup>

Certain petitions are of course, and are subject to some regulations hereinafter stated. With respect to all other petitions, they are either what are called cause petitions, that is to say, they are instituted in a cause and presented either by a party to the cause, or by some person who has a right to present a petition in the cause, or they are in a matter or under an Act of Parliament. The 6th Order of 11th November, 1841, directs, with respect to these later petitions, "That all petitions not in any cause, which are pre-

<sup>1</sup> *Withey v. Haigh*, 3 Mad. 437.

<sup>2</sup> *Farquharson v. Pitcher*, 4 Russ. 510; *Warner v. Armstrong*, 4 Sim. 140; and see *Lewis v. Armstrong*, 3 M. & K. 69.

<sup>3</sup> *Bellchamber v. Giani*, 3 Mad. 550. See ante, 1696, note; *Ray v. Conner*, 3 Edw. Ch. 478.

<sup>4</sup> Ante, p. 1551.

<sup>5</sup> Har. (ed. Newl.) 417.

sented to the Lord Chancellor, are to be marked with the title of one of the Vice-Chancellors, and are thenceforth to be attached to such Vice-Chancellor's Court, unless removed therefrom by a special order of the Lord Chancellor." All petitions intended to be heard by the Lord Chancellor, or one of the Vice-Chancellors, are presented to and answered by the Lord Chancellor; those intended to be heard by the Master of the Rolls are presented to and answered by him.

Petitions may be presented, either in a cause or in a matter over which the Lord Chancellor or the Court of Chancery has jurisdiction under some Act of Parliament or other special authority.<sup>1</sup>

In general, a petition cannot be presented in a cause till the bill has been filed. The case of a plaintiff petitioning to sue *in forma pauperis*, appears to form an exception to this rule.<sup>2</sup> Petitions are either what are called special petitions or petitions of course. Special petitions will be first considered.

A cause petition must be properly entitled in the cause in which it is presented, and must, when not for a matter of course, be addressed to the Judge to whom the cause is attached.<sup>3</sup>

The petition states by whom the petition is presented, and the particulars of the case, and concludes with praying the Court to make the order required.

Brevity and form are the two things chiefly to be observed in drawing petitions, to which may be added care to avoid scandal or impertinence, for which a petition, as well as any other proceeding, may be referred.

A petition must be fairly written upon paper, but it need not be written upon parchment.<sup>4</sup> Except it be for a rehearing or appeal, it is not signed by counsel, nor need it be prepared by one; but by the 120th Order of May, 1845, the Taxing Master

<sup>1</sup> When a lunatic is interested in the funds in a cause, a petition respecting them may be presented to the Vice-Chancellor before whom the cause is, and not necessarily to the Lord Chancellor in Lunacy; *Volans v. Carr*, 2 De G. & Sm. 242; *Davies v. Davies*, 2 De G., Mac. & Gor. 51; *Re Berry*, 13 Beav. 455.

<sup>2</sup> Har. (ed. Newl.) 417. A guardian may also be appointed for an infant and maintenance allowed, on petition, without bill filed. See *Matter of Bostwick*, 4 John. Ch. 102; *Ex parte Salter*, 3 Bro. C. C. 500; *Ex parte Mountfort*, 15 Vesey, 445.

<sup>3</sup> Ante, p. 1694.

<sup>4</sup> Petitions must be sworn to. *Anon.*, Hopk. 101; *Matter of Christie*, 5 Paige, 242.

is directed to allow in taxation between party and party the costs of such petitions as appear to have been proper to be settled by counsel.

Petitions addressed to the Lord Chancellor must be left with his principal secretary, who, if it is not for a matter of course,<sup>1</sup> will procure it to be answered by means of a memorandum, written at the foot, and signed by his Lordship, directing all parties concerned to attend before him on the next day of petitions,<sup>2</sup> unless upon previous application either to his Lordship, or a Vice-Chancellor, permission has been given to have the petition answered for an earlier day. When the petition is answered it is taken away, and a fair copy of it must be left for the use of the Judge.

Petitions addressed to the Master of the Rolls must be left with the secretary at the Rolls, who of course procures it to be answered in the same manner as petitions addressed to the Lord Chancellor.

With respect to petitions of course the 29th Order of 1833, directs, that, "With a view to the convenience of the suitors and their solicitors, and for the purpose of diminishing the expense of orders on petitions of course, which, according to the practice of the Court, may be presented to the Master of the Rolls, one of the secretaries of the Master of the Rolls shall, upon any such petition of course, (*except upon petitions for setting down causes to be reheard,*) which shall be presented to his Honor, instead of answering such petitions as heretofore, draw up the orders thereon in such form as the Master of the Rolls shall, from time to time, direct; every such order to be signed, as passed, with the initials of such secretary. And the under-secretary shall enter, or cause to be entered, every such order, in a book to be kept at the Secretary's Office, at the Rolls, for that purpose, and shall then mark and sign such order, with his initials, as entered; and that the suitors of the Court and their solicitors shall have access to the

<sup>1</sup> Petitions for matters of course are very seldom presented to the Lord Chancellor; but if they are, upon his Lordship's *fiat* being obtained, they are taken to the Registrar who draws up the order.

<sup>2</sup> The days for hearing petitions are generally appointed in the seal paper, issued previously to and after each term. Where two petitions, presented in the same matter, are answered on the same day, that which is first presented is entitled to precedence; *Re Brookman*, 1 Mac. & Gor. 199; and parties may be added as co-petitioners after the *fiat* is given; *Maude v. Maude*, 5 De G. & Sm. 418.

said book, during office hours, without the payment of any fee ; and for every such order so to be made as aforesaid, there shall be paid the same fees as have hitherto been payable in respect of such petitions as aforesaid, in lieu of the fees on such petitions ; and there shall also be paid to the chief secretary, for filing every such petition, the sum of one shilling ; and to the under-secretary for entering every such order, the sum of sixpence. And every such order, so to be made as aforesaid, shall have the same force and effect as orders of course passed by the Registrars now have, and without the payment of the fees heretofore payable on such orders at the Registrar's Office ; and for every office copy that may be required of any such order, there shall be paid to the chief secretary (who shall mark the same as examined, and authenticate it by affixing his initials thereto) the sum of sixpence and no more for making the same."

All petitions, except those which are of course, require service upon the adverse party, unless there is no other party interested in the matter, as in the case of petitions for the transfer or sale of stock, or the payment out of Court of money standing to the separate account of the petitioner, in which case no service is necessary.<sup>1</sup>

Two *clear* days must intervene between the service of a petition, and the day appointed for hearing it, as in the case of a motion.

Service in cases which do not require *personal* service, is effected by delivering a copy of the petition, as answered, to the adverse solicitor,<sup>2</sup> at the same time showing him the original petition and answer thereto.

Personal service is effected by delivering a copy of the petition to the party, and showing him the original in the same manner. If the petition require personal service, and the party cannot be found, an application must be made by motion, upon affidavit, for an order to substitute service, by leaving a copy of the petition at the party's dwelling-house, or place of abode, with one of the family, or upon the solicitor.<sup>3</sup>

Petitions which are not of course are set down in the paper of petitions appointed for the day, and are called on in their regular order. The rules with regard to reading affidavits and the general

<sup>1</sup> *Lambert v. Newark*, 3 De G. & Sm. 405 ; *Re Wise*, 5 De G. & Sm. 415.

<sup>2</sup> See the manner of serving notices of motion, ante, p. 1703.

<sup>3</sup> 2 Turn. & V. 229.

practice upon the hearing are nearly the same as those with regard to motions.<sup>1</sup>

If, upon the hearing, the petitioner does not appear, the petition will be dismissed with costs, upon the production by the respondent of an office copy of an affidavit of service of the petition, made by the person upon whom it was served.<sup>2</sup> On the other hand, if no one appears against the petition, an order, conformable to the prayer thereof, will be made on production of an affidavit of the service of the petition upon all the parties interested, provided the case justifies the order. In either case, the affidavit of service must be made and filed before the rising of the Court on that day.<sup>3</sup> Any party who is served with a petition has, as a general rule, a right to the costs of his appearance.<sup>4</sup>

If it is intended to enforce the performance of the order by process of contempt, the order must be served upon the party to be affected by it, unless a special order has been obtained to authorize substituted service.<sup>5</sup> And where an order was made for the payment of a sum of money by two solicitors, who were in copartnership, service of the order upon one, leaving a copy at the place where the partnership business was carried on, was held not to be sufficient to ground a proceeding for a contempt.<sup>6</sup>

<sup>1</sup> Ante, p. 1706. In New Jersey, when a petition is presented, and an adverse party has a right to be heard in opposition, the usual proceeding is, to grant a rule or order, fixing a day for the hearing of the parties. Copies of the petition and rule are served on the opposite party. The parties are then at liberty to take affidavits, which must be either taken upon two days' notice, or else copies served on the adverse party at least four days before the day of argument. The matters presented by the petition are heard upon these affidavits, and upon them only. The petition itself is no evidence of the facts stated in it. They must all be proved *aliunde*. No answer to the petition is required. *Crane v. Brigham*, 3 Stockt. (N. J.) 33; *Coxe v. Halsted*, 1 Green Ch. 311; *State Bank v. Bell*, 3 Halst. Ch. 376.

<sup>2</sup> 1 Smith, 76.

<sup>3</sup> Ante, p. 1704.

<sup>4</sup> *Re Stevens*, 2 Phil. 772; *Re Shrewsbury School*, 1 Mac. & Gor. 85.

<sup>5</sup> *Hunter v. —*, 6 Sim. 429. See *Lorton v. Seaman*, 9 Paige, 609. A personal service will be dispensed with where the party cannot be found. And where an order is served upon the solicitor, if knowledge of such service is brought home to the party, he will be in contempt by not obeying the order, in the same manner as if it had been served upon him personally. *People v. Brower*, 4 Paige, 405. See *Stafford v. Brown*, 4 Paige, 360.

<sup>6</sup> *Young v. Goodson*, 2 Russ. 255. An order for payment of costs is several as well as joint, and the subpoena may be served upon either or all, ante, p. 1522; see, however, *Brown v. Robertson*, 2 Phil. 173.

There does not seem to be any difference in the process of contempt to enforce an order made upon motion, or petition, from the process applicable upon decrees and decretal orders.<sup>1</sup>

It has been already stated, that interlocutory orders, made upon motion,<sup>2</sup> may be altered, varied or discharged upon motion; and that orders of course, made upon petition, may be discharged by the same process;<sup>3</sup> but after an order made upon petition has been drawn up, leave will not be granted to amend it, without another petition being presented, praying for a variation of the order.<sup>4</sup>

Orders made *ex parte*, upon petition, may also be discharged upon motion, where the application is made on the ground of irregularity. The rule is, however, different with regard to orders made upon the merits of a petition duly heard, which, as we have seen, must be the subject of a regular rehearing.<sup>5</sup> When, however, the objection to the petition, and the order made thereupon, was, that they were entitled in a non-existing cause, the Court discharged the order on motion.<sup>6</sup>

It may be noticed here, that an order made by a branch of the Court, which, under the Orders of 1837, has not properly jurisdiction over the cause, must, till discharged, be treated as a valid order, and the party served with such order is not at liberty to treat it as a nullity by obtaining another order inconsistent with it, from the proper branch of the Court.<sup>7</sup>

<sup>1</sup> Ante, p. 1054 *et seq.*

<sup>2</sup> See *Fanning v. Dunham*, 4 John. Ch. 35. An order or decree by consent cannot be modified or varied in an essential part without the assent of both parties to the same. *Leitch v. Cumpston*, 4 Paige, 476.

<sup>3</sup> Ante, p. 1551.

<sup>4</sup> *In re Marrow*, Cr. & Ph. 146.

<sup>5</sup> Ibid.

<sup>6</sup> *West v. Smith*, 3 Beav. 306.

<sup>7</sup> *Wilkins v. Stevens*, 10 Sim. 617; *Boddy v. Kent*, 1 Mer. 361; *Chuck v. Cremer*, 2 Phil. 113.

## CHAPTER XXXVIII.

## OF INJUNCTIONS.

SECTION I. — *Different Sorts of Injunctions.*

HAVING pointed out, in the last Chapter, the general nature of interlocutory applications, and of the practice arising upon them, it will be convenient to direct the practitioner's attention to applications for those provisional writs and orders which the Court has the power of issuing, for the purpose of restraining a party from exercising his ordinary rights in a manner productive of injury to the party applying, pending a litigation in the cause. These are writs of *injunction*, restraining orders, stop orders and writs of *ne exeat regno*, the three former being restrictive of the party's right of action or of property, and the last of the right, which every British subject enjoys, of quitting the country whenever he may be disposed to do so.<sup>1</sup>

A writ of injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ; the process, however, is rather preventive than restorative, though it is by no means confined to the former object.<sup>2</sup>

<sup>1</sup> There are other writs issuing out of the Court of Chancery, which, however, do not come within the description of writs issued upon interlocutory orders. These are writs of *certiorari*, which are the judicial writs issued upon a bill filed expressly for the purpose of procuring them, and writs *de homine replegiando*, Harr. (ed. Newl.) 562, and of *supplicavit*, *ibid.* 563, the former of which is nearly obsolete; and the latter of which, not being necessarily returnable in Chancery, can scarcely be said to belong to the equitable jurisdiction of the Court. The present section will be devoted to the consideration of the practice relating to writs of injunction.

<sup>2</sup> *Winnipissiogee Lake Co. v. Worster*, 9 Foster (N. H.) 449; *Washington University v. Green*, 1 Maryl. Ch. Dec. 97; 2 Story Eq. Jur. § 861, § 862. It seeks to prevent a meditated wrong more often than to redress an injury already done. It is not confined to cases falling within the exercise of the concurrent jurisdiction of the Court; but it equally applies to cases belonging to its exclusive and to its auxiliary jurisdiction. 2 Story Eq. Jur. § 862; Jeremy on Eq. Juris. B. 3, c. 2, § 1, p. 308. The most common sort of injunctions is that, which operates as a restraint upon a party in the exercise of his real or supposed rights; and this is sometimes called the remedial writ of injunction. The other sort,

Injunctions are either provisional or perpetual: *provisional* injunctions are such as are to continue until the coming-in of the defendant's answer, or until the hearing of the case; *perpetual* are such as form part of the decree made at the hearing, upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.<sup>1</sup> Injunctions of this nature, however, scarcely come within the scope of the present Chapter, — the object of which is chiefly to point out the case in which the Court will grant this writ upon interlocutory applications.<sup>2</sup>

Provisional injunctions have been heretofore divided into two kinds, *common* and *special*. *Common injunctions* are those which commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same; as, for instance, it may contain a direction to the party defendant to yield up, or to quiet, or to continue, the possession of the land, or other property, which constitutes the subject-matter of the decree in favor of the other party. 2 Story Eq. Jur. § 861; Eden on Injunct. ch. 1, (2d Am. ed.) 9 to 13. An injunction is a secondary process, (except it be for the prevention of torts, or in cases affected by statute,) and must be asked in aid of some primary equity, which must be disclosed in the same bill that prays for the injunction. *Washington v. Emery*, 4 Jones Eq. (N. C.) 29; *Patterson v. Miller*, 4 Jones Eq. (N. C.) 451. Where there is no Equity in the bill there can be no injunction. *Smith v. Lard*, 28 Georgia, 585. The interdicts of the Roman law, which much resembled the injunctions of our own law, were, (1.) Prohibitory, which prohibited something being done. (2.) Restoratory, which commanded something to be restored. (3.) Exhibitory, which commanded some person or thing to be exhibited. Lord Mackenzie, *Roman Law* (ed. 1862) 310 *et seq*; 1 Kaufmann's *Mackeldey*, 211 *et seq*. In *Stone v. Hobart*, 8 Pick. 464, 466, the Court in Massachusetts say, "We have no power in Chancery, except by statute; and the general authority to issue injunctions has not been given. The exercise of such a power exists only when the subject-matter falls within the jurisdiction granted by the legislature." "Injunctions against proceedings at law are within the general jurisdiction of Chancery, which we are not authorized to assume." But the powers of the Court are very much enlarged under the General Statutes, and applications to restrain proceedings at law in proper cases would now be entertained, the authority being clear and indisputable. See *Atlas Bank v. Nahant Bank*, 23 Pick. 480, 492; *Deshon v. Foster*, 4 Allen, 545, 550.

<sup>1</sup> For. Rom. 194, 195.

<sup>2</sup> There is also another species of injunction, which was formerly familiar in practice, viz., injunctions to deliver up possession of property; injunctions of this nature were considered necessary before a writ of assistance could be issued to the sheriffs, but they have now been discontinued. Ante, pp. 1082, 1083.

were granted as of course, — upon a defendant being in default for not appearing or for not answering within the time limited for that purpose by the Orders of the Court. *Special injunctions* being those which are now and have always been granted upon special grounds, arising out of the circumstances of the case.<sup>1</sup>

This distinction has however been recently abolished, and by the 58th section of the 15 & 16 Vict. c. 85, it has been enacted, “That the practice of the Court of Chancery with respect to injunctions for the stay of proceedings at Law, shall, so far as the nature of the case will admit, be assimilated to the practice of such Court with respect to special injunctions generally, and such injunctions may be granted upon interlocutory applications, supported by affidavit, in like manner as other special injunctions are granted by the said Court.”<sup>2</sup>

Moreover, by the 45th Order of the 7th August, 1852, it is directed, that “No injunction for stay of proceedings at Law is to be granted as of course for default of appearance or answer to the bill.”

Under the present practice, therefore, it is not requisite to make any distinction between special and common injunctions, but the attention of the reader will be directed to any peculiarities that still exist with respect to injunctions to stay proceedings at Law.<sup>3</sup>

The granting therefore of all injunctions is now discretionary

<sup>1</sup> Beames's Ord. 16.

<sup>2</sup> *Senior v. Pritchard*, 16 Beav. 473; *Lovell v. Galloway*, 17 Beav. 1; *Magnay v. Mines Royal Company*, 3 Dr. 130.

<sup>3</sup> Injunctions cannot be granted in the Courts of the United States without notice, and hence all of them in those Courts are special. *Penny v. Parker*, 1 Wood & Minot, 280. See 1 Hoff. Ch. Pr. 78; 1 Smith Ch. Pr. (2d Am. ed.) 591 note (a); *Elmslie v. Delaware & Schuylkill Canal Co.*, 4 Whart. 424; *Poor v. Carlton*, 3 Sumner, 73, 74; *Hall v. M'Pherson*, 3 Bland, 529.

By the 55th Equity Rule of the United States Courts, whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the Court in term, or by a Judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case, where an injunction, either the common injunction, or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the Judge granting the same, continue until the next term of the Court, or until it is dissolved by some other order of the Court. See *Penny v. Parker*, in note above.

with the Court, but it may be stated, as a general rule, that injunctions will not be granted except upon a bill<sup>1</sup> filed for the purpose of specifically praying for an injunction;<sup>2</sup> nor against any one who is not a party to the suit.<sup>3</sup> The rule, however, is not universal, but is subject to several exceptions; thus, if the Court, having full cognizance of the matter, has, by its decree, taken it into its own hands, it will interfere, by its injunction, to prevent injury to the property either by the parties litigant or others, although there is no injunction prayed by the bill.<sup>4</sup> Instances of this occur in cases of foreclosure, in which, if, after a decree to account, the mortgagor attempts to cut timber, the Court will enjoin him, though there was no prayer for an injunction in the bill.<sup>5</sup>

Upon the same principle, if there has been a decree for the administration of assets, the Court will restrain a creditor, who is not a party to the suit, from proceeding at Law against the testator's or intestate's estate for its own individual debt.<sup>6</sup> This it does, because it considers the decree it has made in the nature of a judgment for all the creditors,<sup>7</sup> and having taken the fund into his own hands, it will administer it equitably, and not permit the

<sup>1</sup> It appears that an injunction will not be granted in a suit commenced by claim; *Holder v. Chalcraft*, 14 Jur. 846. It will be recollected that a written copy of a bill praying for an injunction, may still be filed, ante, p. 317. Injunctions in certain cases may be granted in Vermont without a bill being filed. *Peck v. Crane*, 25 Vermont, 146.

<sup>2</sup> See ante, pp. 393, 394, and notes; *Walker v. Devereaux*, 4 Paige, 229; *Story Eq. Pl. § 41, 42*. The bill or petition asking for an injunction must be sworn to. Where the facts on which the injunction is asked are not within the personal knowledge of the plaintiff, he should state the facts on his own information and belief, and annex the affidavits of the person from whom he obtained the information, or some other person who can swear to the truth of the material allegations in the bill. *Campbell v. Morrison*, 7 Paige, 157; *Bank of Orleans v. Skinner*, 9 Paige, 305. See *Hammersley v. Wyckoff*, 8 Paige, 72.

<sup>3</sup> *Prac. Reg.* 281; *Dawson v. Princeps*, 2 Anst. 521; *Gadd v. Worrall*, *ibid.* 555; *Brown v. Frost*, 1 Sudg. V. & P. 8th ed. 206.

<sup>4</sup> See *Matter of Hemiup*, 2 Paige, 319. But it is a general rule that an injunction will not be granted against persons who are not parties to the suit. *Fellows v. Fellows*, 4 John. Ch. 25; *Waller v. Harris*, 7 Paige, 167.

<sup>5</sup> *Wright v. Atkyns*, 1 V. & B. 313, 314.

<sup>6</sup> *Thompson v. Brown*, 4 John. Ch. 642. See *Benson v. Le Roy*, 4 John. Ch. 651.

<sup>7</sup> *Martin v. Martin*, 1 Ves. 211; *Bank of England v. Morice*, For. 217; 2 Bro. P. C. 465; *Paxton v. Douglas*, 8 Ves. 520; *Hazen v. Durling*, 1 Green Ch. 138.

executor to be pursued at Law. This practice of restraining a creditor, although no injunction had been prayed in terms against him, commenced at the end of the last century. Now the more usual practice is to restrain further proceedings in the action.<sup>1</sup>

The proposition that a decree is equal to a judgment, which appears to have been the origin of the jurisdiction, acquires additional force in modern times by the stat. 1 & 2 Vict. c. 110, under which the same remedies are given to enforce a decree as a judgment.

This power is not confined to the executor or administrator only, but the injunction will equally be granted on the application of the heir,<sup>2</sup> or of another creditor,<sup>3</sup> or of a common legatee, or even, as it seems, of a residuary legatee.<sup>4</sup> There is no instance, however, in which a creditor at Law has ever been stopped, unless there was a decree under which he could come in ; for, until there is such a decree, the creditor ought not to be deprived of the benefit of a prior judgment ;<sup>5</sup> but when the decree has been made, then, from that moment, it must be preferred if it precedes the judgment in point of time, and all the creditors must be paid according to their priorities as they then stand.<sup>6</sup>

But although the rule is, that the Court will interfere to give effect to its own decree, yet it will not interfere to protect an executor from any liability to which he may have, personally, subjected himself. Therefore, if he has put in such a plea at Law as will entitle the creditor to a judgment, *de bonis propriis*, or to a judgment *de bonis testatoris et si non de bonis propriis*, or to a judgment *de bonis testatoris* merely, the execution of it will not be restrained.<sup>7</sup>

<sup>1</sup> Seton, p. 461. Even though the creditor be proceeding in a foreign Court. *Graham v. Maxwell*, 1 Mac. & Gor. 71 ; *Maclaren v. Stainton*, 16 Beav. 284.

<sup>2</sup> *Martin v. Martin*, *ubi supra* ; *Rouse v. Jones*, 1 Phil. 462.

<sup>3</sup> *Dyer v. Kearsley*, 2 Mer. 482, n. ; *Earl of Portarlington v. Damer*, 2 Phil. 264.

<sup>4</sup> *Brooks v. Reynolds*, 1 Bro. C. C. 183 ; 2 Swanst. 545 ; and see *Clarke v. The Earl of Ormonde*, Jac. 122 ; *Ratcliffe v. Winch*, 16 Beav. 576.

<sup>5</sup> *Rush v. Higgs*, 4 Ves. 637 ; and see *Perry v. Phelps*, 10 Ves. 34 ; *Cas. t. Talbot*, 22. As to what will constitute such a decree, see *Rankin v. Harwood*, 2 Phil. 22.

<sup>6</sup> *Largan v. Bowen*, 1 Sch. & Lef. 296 ; *Lee v. Park*, 1 Keen, 724 ; see *Green v. Pledger*, 3 Hare, 165 ; *Whitaker v. Wright*, 2 Hare, 310.

<sup>7</sup> See *Vincent v. Godson*, 3 De G. & Sm. 717, and the cases there cited. With respect to the description of pleas that will have that effect, see the judgment of

It is provided by express enactment, that the privilege of restraining a creditor shall be conferred upon executors and administrators who have filed a certificate of debt under the 19th section of what is frequently called Sir George Turner's Act. The 24th section provides, "That after the filing of such report as aforesaid, it shall be lawful for the said Court, upon the application of the executors or administrators of the deceased, by order to be made on motion, to restrain by injunction any proceedings at Law against them by any person having or claiming to have any demand upon the estate of the deceased, by reason of any debt or liability, other than the persons who may have established contingent liabilities under the said order for which no appropriation may have been made."

A simple order, however, for preliminary inquiries has been held not a sufficient decree to entitle an executor to an injunction against a creditor.<sup>1</sup>

As the practice of granting injunctions of this description might be liable to abuse, by a friendly creditor filing a bill and obtaining a decree, it has been laid down as a rule, that an injunction to restrain a creditor from proceeding at Law shall not be granted without an affidavit from the executor as to what assets he has in his hands.<sup>2</sup>

Such an affidavit is of course not necessary where the assets are stated, or the balance set forth in the answer,<sup>3</sup> so that a motion for the payment of it into Court be made, and then the injunction may be granted upon the terms of the executor's bringing the money into Court.<sup>4</sup> It is right to state, in this place, that a creditor, who is restrained by an injunction of this nature, is entitled to his costs at Law, up to the time when he first had notice of the decree,<sup>5</sup> but not to the costs subsequently incurred. In recent cases he has been allowed the costs of the motion, unless his conduct disentitles him thereto.<sup>6</sup>

Lord Langdale in *Lee v. Park*, 1 Keen, 714; and see *Dyer v. Kearsley*, 2 Mer. 482, n.; *Rouse v. Jones*, 1 Phil. 462; *Vernon v. Thelluson*, 1 Phil. 466.

<sup>1</sup> *Teague v. Richards*, 11 Sim. 46.

<sup>2</sup> *Cleverley v. Cleverley*, cited 8 Ves. 521; *Ladbroke v. Sloane*, 3 De G. & Sm. 291. In the case of a legatee, the affidavit is unnecessary. *Ratcliffe v. Winch*, 16 Beav. 576.

<sup>3</sup> *Gilpin v. Lady Southampton*, 18 Ves. 469.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Paxton v. Douglas*, 8 Ves. 521; *Jackson v. Leaf*, 1 J. & W. 231.

<sup>6</sup> *Jones v. Jones*, 5 Sim. 678; *Turner v. Turner*, 15 Sim. 630; *Cole v. Burgess*, 1 Kay, App. 1; *Graham v. Maxwell*, 1 Mac. & Gor. 71.

The second occasion in which an injunction will be granted without a bill being filed for the express purpose, is where a plaintiff is proceeding against the defendant both at Law and in Equity, at the same time and for the same matter; in such cases, as we have seen,<sup>1</sup> the defendant has a right, upon putting in his answer to the bill in Chancery, to call upon the plaintiff to elect in which Court he will proceed, and then, if the plaintiff elects to proceed in Equity, the Court will interfere, by injunction, to restrain him from further proceeding at Law.<sup>2</sup>

The remedy given by election applies to a case where the plaintiff has not proceeded to a decree. After decree, the benefit of the order to elect is lost, because the plaintiff has already made his election, and the decree has decided the question between the parties. But after decree, although under special circumstances the plaintiff will be permitted to sue the defendant, both under the decree, and also to adopt proceedings against him in other Courts, and in foreign countries; yet the plaintiff ought, before taking such steps, to apply for leave to the Court; and if he proceeds without such leave, the Court will restrain him, upon the application of the defendant.<sup>3</sup>

Another class of cases in which an injunction may be obtained without a bill being filed for that purpose, has been already pointed out as proceeding from the jealousy entertained by the Court of any interference with its process by another tribunal, for which reason the Court will, as we have seen, issue its injunction to restrain an action at Law to recover damages for false imprisonment under process of contempt improperly issued.<sup>4</sup>

With the exceptions above enumerated, the rule is, that, before the Court will issue an injunction, a bill must be filed, of which bill a prayer for an injunction must form a part.<sup>5</sup>

The various cases in which this Court will interfere by injunction are almost as numerous as the matters which fall within the equitable jurisdiction of the Court of Chancery; for, whenever a plaintiff is entitled to equitable relief, then, if that relief consists in restraining the commission or continuance of some act of the defendant, the Court will enjoin him by means of this prohibitory

<sup>1</sup> Ante, p. 817.

<sup>2</sup> *Rogers v. Vosburgh*, 4 John. Ch. 84.

<sup>3</sup> *Wedderburn v. Wedderburn*, 2 Beav. 208.

<sup>4</sup> See ante, pp. 494, 495.

<sup>5</sup> Story Eq. Pl. § 41 and note.

writ. There are some cases, however, in which an injunction will not be granted, and the consideration of these, in the first place, will clear the way before us for the fuller investigation of the subject.<sup>1</sup>

It is an established rule, that the Courts will grant no injunction, or order in the nature of an injunction, to stay proceedings in any criminal matter.<sup>2</sup> "If they did," said Chief Justice Holt, "the Court of Queen's Bench would break it, and protect any that would proceed in contempt of it."<sup>3</sup> Accordingly, in the case of *Lord Montague v. Dudman*,<sup>4</sup> Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a *mandamus* issued to compel the lord of a manor to hold a Court. "The Court," he said, "has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, or on an indictment, or an information, or a writ of prohibition." But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in Equity, for, if they are, then they are subject to control by an order personally affecting them.

If, for instance, a suit were to be instituted to establish a right to land where entries have been made, and the bill should seek to quiet the possession, and after filing the bill the plaintiff should prefer an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace and is also a civil right, "the Court," said Lord Hardwicke, "would certainly stop the proceedings upon such an indictment." Upon this principle Lord Hardwicke acted in *The Mayor of York v. Pilkington*,<sup>5</sup> where a bill had been filed to establish a right of fishing, and the plaintiffs in the first cause indicted the agents of the defendants for a breach of the peace in fishing; there an injunction was

<sup>1</sup> An injunction will not be granted on application *ex parte*, or, if granted, will be dissolved, when it appears that the refusal to grant, or the dissolution, cannot lead to any injury, or cause any loss to the plaintiff, which cannot be repaired in damages, or affect the merits of the controversy on a trial in due course. *Wing v. Fairhaven*, 8 Cushing, 363.

<sup>2</sup> See *Burnett v. Craig*, 30 Alabama, 135.

<sup>3</sup> *Holderness v. Saunders*, 6 Mod. 19.

<sup>4</sup> 2 Ves. 396.

<sup>5</sup> 2 Atk. 302; see 2 Ves. 398; and see *Attorney-General v. Cleaver*, 18 Ves. 220.

granted with reference to what was civilly in question between the parties, though it was also the subject of a criminal prosecution ; for, while the question of right was depending in Equity, it was but reasonable that the plaintiff should not proceed by action or indictment until it was determined there.<sup>1</sup>

It is now, also, settled that there is no jurisdiction in a Court of Equity whereby an injunction may be obtained to stay the process of a Court of Law upon an award which has been made a rule of Court under the statute 9 & 10 Will. III. c. 15.<sup>2</sup>

It appears now to be settled, that no Court, except the Court in which the submission is to be made a rule, has the power of reviewing the award, and that it makes no difference whether that submission is so made a rule before or after the bill is filed.<sup>3</sup>

An injunction will not lie to relieve the plaintiff against a judgment at Law, where the case in Equity proceeds upon a ground which was equally available at Law, unless the plaintiff can establish some special equitable ground for the relief which he asks;<sup>4</sup> accordingly it was held, in *Harrison v. Nettleship*,<sup>5</sup> that a plaintiff in Equity who had pleaded a set-off in an action at Law and failed, could not sustain a bill for an account relating to the same transaction as to which he had pleaded the set-off. But if a defence could not have been made available in the Court of Law at the same time or under the circumstances, and there was no *laches* in the party applying, then relief will be granted, and the Court of Chancery will interfere by its injunction.<sup>6</sup> So, also, if a fact, material to the merits, which would render the proceedings upon

<sup>1</sup> These cases do not interfere with the well-established rule, that the Court of Chancery has originally no jurisdiction to enjoin or regulate any criminal proceedings; but when the injunction is granted, it is merely incidental to the ordinary power which it ought to have of imposing terms upon the parties who seek its aid in furtherance of their rights.

<sup>2</sup> *Gwinett v. Bannister*, 14 Ves. 530; *Nichols v. Roe*, 3 M. & K. 431; *Davies v. Getty*, 1 S. & S. 411, and see *Pope v. Lord Duncannon*, 9 Sim. 177, as restraining a defendant from acting upon an award made after the submission was revoked by the plaintiff.

<sup>3</sup> *Nichols v. Roe*, 3 M. & K. 431; see, also, *Davies v. Getty*, 1 S. & S. 411; and *Dawson v. Sadler*, *ubi supra*; *Heming v. Swinnerton*, 2 Phill. 79.

<sup>4</sup> See *Stone v. Hobart*, 8 Pick. 466; S. C. 10 Pick. 215.

<sup>5</sup> 2 M. & K. 423; and see *Simpson v. Lord Howden*, 3 M. & C. 97.

<sup>6</sup> *Farquharson v. Pitcher*, 2 Russ. 81.

the judgment inequitable, should be discovered after a trial, which could not, by ordinary diligence, have been ascertained before, relief will be granted.<sup>1</sup>

These, however, are mere exceptions to the general rule, for the general rule is, that Equity will not relieve after a verdict where the defendant at Law might probably have defended himself there.<sup>2</sup>

There are cases cognizable at Law and also in Equity, in which Equity will sometimes interfere, after matter has been determined in a Court of Law; for instance, in a case of complicated account, where the party has not made a defence, because it was impossible for him to do it effectually at Law, or where a verdict has been obtained by fraud,<sup>3</sup> or where a party has possessed himself improperly of something by means of which he has acquired an unconscientious advantage which Equity will either put out of the way or restrain him from using.

Excepting, however, in the cases above put, or in cases of the like nature, an injunction will not be granted where the cause has

<sup>1</sup> *Jarvis v. Chandler*, 1 T. & R. 319.

<sup>2</sup> *Protheroe v. Forman*, 2 Swanst. 229; and see *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424; *Lord Red.* 132; *Semell v. Freeston*, 1 Chan. Ca. 65; *Taylor v. Sheppard*, 1 Y. & C. Exch. Rep. 271; *Hankey v. Vernon*, 2 Cox, 12; *Fuller v. Cadwell*, 6 Allen, 505; *Borland v. Thornton*, 12 Calif. 440; *Ponder v. Cox*, 26 Georgia, 485; *Jordan v. Thomas*, 34 Miss. 72; *Todd v. Fisk*, 14 La. An. 13; *Gibson v. Moore*, 22 Texas, 611; *Kreichbaum v. Bridges*, 1 Clarke (Iowa) 14; *Farmers' Bank v. Vanmeter*, 4 Hen. & Munf. 553; *Dodge v. Strong*, 2 John. Ch. 230; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Woodworth v. Van Buskirk*, 1 John. Ch. 432; *Vaughn v. Fuller*, 23 Georgia, 366; *Forsythe v. McCreight*, 10 Rich. Eq. (S. C.) 308. An injunction will not be granted, if the person seeking it could, by proper vigilance, have protected himself from injury by the ordinary means at law. *Albritton v. Bird*, R. M. Charlt. 93; *Dodge v. Strong*, *supra*; *Fuller v. Cadwell*, 6 Allen, 505; *Derbyshire &c. Railway Co. v. Serrell*, 2 De Gex & Sm. 353; *Anderson v. Dowling*, 11 Irish Eq. 590; *N. Y. Dry Dock Co. v. Amer. Life Ins. & Trust Co.*, 11 Paige, 384; *Morris Canal & Banking Co. v. Dennis*, 1 Beasley (N. J.) 249; *Drewry on Injunct.* 10 - 12; 2 Story Eq. Jur. § 882, 894; *Taliaferro v. Branch Bank Mont.* 23 Alabama, 755; *Morris Canal &c. Co. v. Dennis*, 1 Beasley (N. J.) 249; *Chambless v. Taber*, 26 Georgia, 167; *Smith v. Ryan*, 20 Texas, 661; *Farmers' &c. Bank v. Ruse*, 27 Georgia, 391; *Stubbs v. Leavitt*, 30 Alabama, 352; *Watt v. Cobb*, 32 Alabama, 530; *Methodist P. Church v. Mayor and Common Council of Baltimore*, 6 Gill, 391; *Briesch v. McCauley*, 7 Gill, 189; *Bruner v. Planters' Bank*, 23 Miss. (1 Cush.) 406; *Yongue v. Billups*, 23 Miss. (1 Cush.) 407; *Imlay v. Carpentier*, 14 Calif. 173.

<sup>3</sup> *Isaac v. Humpage*, 1 Ves. jr. 427; S. C. 3 Bro. C. C. 463.

already been decided by the proper tribunal.<sup>1</sup> Therefore a Court of Equity will not relieve by granting an injunction and staying execution on a judgment, because there has been a mistake in the pleading, or in the conduct of the cause,<sup>2</sup> or merely to let in new corroborative evidence, for the jurisdiction does not arise from the circumstance that a party has omitted to make a proper defence.<sup>3</sup>

It is to be observed here, that a distinction has been attempted to be drawn between an error or mistake in fact, and an error or mistake in law. With respect to the former it has been clearly settled, that where a deed has been executed, or money paid, from ignorance of a fact, or under an erroneous impression respecting it, a Court of Equity will relieve; but there seems to have been some difference upon the question whether it would do so when an act has been done under a mistake of Law;<sup>4</sup> for instance, with respect to family arrangements, it seems to be settled that they will not be disturbed, after a long acquiescence, on the ground that they are founded on a mistake of the parties, or because, in the result, they may turn out to be more advantageous to one party than the other. We may, therefore, infer, from these cases, that an injunction will not be granted to stay any legal proceedings on the ground that the deed or instrument upon which an action was brought was made under a mistake in point of Law,<sup>5</sup> for *ignorantia juris non excusat*.

Having pointed out some of the instances in which the Court will *not* interfere by injunction, we will now proceed to the consideration of the cases in which it will exercise that branch of its jurisdiction.<sup>6</sup>

<sup>1</sup> Bateman v. Willoe, 1 Sch. & Lef. 204.

<sup>2</sup> Stephenson v. Wilson, 2 Vern. 325; Blacknall v. Combs, 2 P. Wms. 70; Kemp v. Mackrell, 2 Ves. 579; Holworthy v. Mortlock, 1 Cox, 141; Farmers' Bank v. Vanmeter, 4 Rand. 553; Jamison v. May, 8 Eng. (13 Ark.) 600.

<sup>3</sup> Ware v. Horwood, 14 Ves. 31; Bullock v. Chapman, 2 De G. & Sm. 211. See Smith v. Lowry, 1 John. Ch. 320; Slack v. Wood, 9 Grattan, 40. An injunction was granted against a judgment at law, grounded on a bill of sale, which was fraudulently obtained. Crawford v. Crawford, 4 Desaus. 176.

<sup>4</sup> Pusey v. Sir Edward Desbouverie, 3 P. Wms. 315; Broderick v. Broderick, 1 P. Wms. 239; Cocking v. Pratt, 1 Ves. 400; Ramsden v. Hylton, 2 Ves. 304; Bingham v. Bingham, 1 Ves. 126.

<sup>5</sup> Stockley v. Stockley, 1 V. & B. 23; Clifton v. Cockburn, 3 M. & K. 7; Neale v. Neale, 1 Keen, 672.

<sup>6</sup> An injunction will generally be granted to secure the enjoyment of a statute

The various instances in which an injunction will be granted are almost as numerous as the matters which fall within the equitable jurisdiction of the Court of Chancery, for, whenever a plaintiff is entitled to equitable relief,<sup>1</sup> then, if that relief consists in restraining the continuance or commission of some act, the Court will enjoin it, by means of this prohibitory writ; it will be impossible, therefore, in a Treatise of this nature, to accomplish more than to enumerate, very briefly, some of the principal purposes for which injunctions will be granted.

Injunctions may be obtained to stay proceedings in other Courts of Justice, whether such Courts are Courts of Law, or Equity, or Spiritual Courts, or Courts of Admiralty, or Courts in a foreign country.<sup>2</sup>

It is a general rule, illustrated by an abundance of cases, that wherever a party,<sup>3</sup> by fraud, accident, mistake or otherwise, has obtained an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong, by restraining the party whose conscience is thus bound, from using the advantage he has there gained;<sup>4</sup> thus, if by fraud, privilege, of which the party is in actual possession, unless the right is doubtful. *Boston & Lowell R. R. Co. v. S. & L. R. R. Co.*, 2 Gray, 27; *Newburgh & C. Turnp. v. Miller*, 5 John. Ch. 101; *Livingston v. Van Ingen*, 9 John. 507; *Croton Turnp. v. Ryder*, 1 John. Ch. 611.

<sup>1</sup> Except to stay waste or prevent irreparable injury, an injunction can issue only as ancillary to some primary equity. *Stockton v. Briggs*, 5 Jones Eq. (N. C.) 309; *Scofield v. Bokkelen*, 5 Jones Eq. (N. C.) 342; *Washington v. Emery*, 4 Jones Eq. (N. C.) 29; *Patterson v. Miller*, 4 Jones Eq. (N. C.) 451; *McRea v. Atlantic & C. R. R. Co.*, 5 Jones Eq. (N. C.) 395. And it is provided by statute in New York, that an injunction shall be granted only when it shall appear by the complaint that the party is entitled to the relief demanded; therefore, contrary to the usual practice, there must be an inquiry into the right of the Court to grant relief, upon a motion for a preliminary injunction. *Hartt v. Harvey*, 32 Barb. (N. Y.) 55.

<sup>2</sup> *Dehon v. Foster*, 4 Allen, 550; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416, 445; *Maclaren v. Stainton*, 16 Beav. 286; *Massie v. Watts*, 6 Cranch, 158; *Briggs v. French*, 1 Sumner, 504; *Dobson v. Pearce*, 4 Duer, 142; *S. C. 2 Kernan* (N. Y.) 156. For the principles applicable to Parliamentary cases, see *Heathcote v. N. S. Railway Company*, 2 Mac. & Gor. 100, and 2 Phill. 666.

<sup>3</sup> No person can enjoin a judgment at law to which he is not a party; but if he is aggrieved, he should pray an injunction to the execution. *Jordan v. Williams*, 3 Rand. 501.

<sup>4</sup> See *Mosby v. Haskins*, 4 Hen. & Munf. 427; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Glenn v. Fowler*, 8 Gill & John. 340; *Emerson v. Udall*, 13 Ver-

accident or mistake, a deed is framed contrary to, or beyond the intention of the parties in their contract on the subject, and the forms of the Courts of Common Law will not admit of such an investigation as will enable them to do justice, the Court of Chancery will restrain the party from asserting his legal rights under the instrument in those points in which it is so framed, until he has investigated the question; when, if the complaint be well founded, it will either rectify the instrument in the points complained of, or permanently restrict the party from making use of it.<sup>1</sup>

The circumstance also that a Court of Equity could compel a full discovery has been considered a sufficient reason for affording relief by injunction until the discovery is obtained.<sup>2</sup> The reason for this interference has now ceased, as the Courts of Law can by their own power insure discovery; but it remains to be seen how far the change will affect the former practice.

Fraud, accident, mistake and discovery, are four of the principal grounds upon which injunctions may be applied for to stay proceedings at Law. And it is to be observed, that an injunction to restrain proceedings at Law, when awarded, does not deny but admit the jurisdiction of the Courts of Common Law; and the ground upon which it issues is, that they are making use of their jurisdiction contrary to equity and good conscience.<sup>3</sup>

mont, 477; *Briggs v. Shaw*, 15 Vermont, 78; *Wingate v. Haywood*, 40 N. Hamp. 441, 453; *Moore v. Gamble*, 1 Stockt. (N. J.) 246; *Wright v. Eaton*, 7 Wis. 595; *Bradley v. Richardson*, 2 Blatch. C. C. 343; S. C. 23 Vermont, 720; *Donnell v. Parrott*, 13 La. An. 250. Equity will not by injunction enable a party to try in Equity a case the defendant has begun to try, and which can and should most properly be tried in a Court of Law. *Reeves v. Cooper*, 1 Beasley Ch. (N. J.) 223; S. C. ib. 498. An injunction is never granted to stay a suit before judgment, merely because the plaintiff has no cause of action. *Chadoin v. Magee*, 20 Texas, 476.

<sup>1</sup> See Lord Red. 103; *Eden on Injunct.* pp. 4-14; and see *North Eastern Railway v. Martin*, 2 Ph. 718.

<sup>2</sup> The cases on this subject are collected in *Eden on Injunctions*, p. 17.

<sup>3</sup> *Hill v. Turner*, 1 Atk. 516; and see what is said in 1 Atkyns, 630. In restraining proceedings at law, Courts of Equity do not proceed upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent their adjudicating on the rights of parties, when drawn in controversy and duly presented for their determination. But the jurisdiction is said to be founded on the authority vested in Courts of Equity over persons within the limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and are therefore contrary to

In these cases the interference of a Court of Equity is founded upon strict equitable principles ; sometimes, however, the question between the parties depends partly upon a legal title and partly on an equitable right, which will arise only in the event of that title being decided in one way. In this case, the practice of the Court is to require that the party applying to the Court for its interposition should admit the legal right of the other party, as in the case of giving judgment in ejectment ;<sup>1</sup> or, if circumstances are not such as to enable him to do that, then to allow the action to go on, in order that the legal rights of the parties may be first ascertained, and that the plaintiff may then come to the Court to apply those legal rights.<sup>2</sup>

It is also to be observed, that, in cases resting upon purely equitable grounds, the injunction is not confined to any one point of the proceedings at Law ;<sup>3</sup> but, upon a proper case being presented to the Court, it may be granted at any stage of the action :<sup>4</sup> thus an injunction is sometimes granted to stay trial ;<sup>5</sup> sometimes, when the parties are in a condition to *enter up judgment*, to restrain their so doing ;<sup>6</sup> sometimes they are issued after a judg-

Equity and good conscience. As the decree of the Court in such cases is intended to operate wholly upon the party and not upon the tribunal where the suit or proceeding is pending, it is immaterial that the party is prosecuting his action in the Courts of a foreign state or country. *Dehon v. Foster*, 4 Allen, 550. See *Marsh v. Eastern R. R. Co.*, 40 N. Hamp. 574, 575 ; *Great Falls Co. v. Worster*, 28 N. Hamp. 462 ; *Bank of Bellows Falls v. Rut. & Burl. R. R. Co.*, 28 Vermont, 470 ; *Hood v. N. Y. & N. H. R. R. Co.*, 23 Conn. 609. A Court cannot interfere in proceedings before another concurrent jurisdiction. *Anthony v. Dunlop*, 8 Calif. 26 ; *Rickett v. Johnson*, 8 Calif. 34 ; *Revolk v. Kraemer*, 8 Calif. 66 ; *Gorham v. Toomey*, 9 Calif. 77 ; *Uhlfelder v. Levy*, 9 Calif. 607. Equity will not interfere where the relief sought can be obtained in the Court in which the action or proceeding is pending. *Uhlfelder v. Levy*, 9 Calif. 607.

<sup>1</sup> It is a rule of practice in the Circuit Courts of the United States, not to allow an injunction to stay an ejectment suit, until it can be investigated in Equity, unless judgment be entered therein. *Turner v. Amer. Baptist Missionary Union*, 5 McLean, 344. See *Henry v. Tupper*, 1 Williams (Vermt.) 518.

<sup>2</sup> *Barnard v. Walls*, Cr. & Ph. 90.

<sup>3</sup> A judgment may be enjoined in part, and be allowed to proceed for the residue. *Dunlap v. Stetson*, 4 Mason, 349 ; *Lyles v. Hatton*, 6 Gill & John. 122 ; *Bell v. Cunningham*, 1 Sumner, 89.

<sup>4</sup> *Albritton v. Bird*, R. M. Charl. 93.

<sup>5</sup> *Codd v. Wooden*, 3 Bro. C. C. 73 ; *Lady Arundell v. Phipps*, 10 Ves. 144 ; *Rowe v. Wood*, 2 Swanst. 234 ; *Prac. Reg.* 250.

<sup>6</sup> *Turner v. Wright*, 1 J. & W. 290.

ment, *to stay execution or proceedings under an execution*; <sup>1</sup> sometimes after execution, to stay the money in the hands of the sheriff, if it be a case of *feri facias*, or to stay the delivery of possession, if it be a *writ of possession*; <sup>2</sup> but it is to be remembered that, after a judgment, an injunction will not be granted, except in those cases where there has been fraud or collusion in obtaining a verdict, or where the party has been unable to defend himself effectually at Law, without any fault or negligence of his own; or where the plaintiff has possessed himself of something by means of which he has obtained an unconscientious advantage; <sup>3</sup> in short, the Courts are unwilling to interfere when it appears that the plaintiff has lain by until after a trial has taken place. <sup>4</sup>

Injunctions are also granted to stay proceedings in other Courts as well as the Courts of Common Law. <sup>5</sup> Ordinarily, when two Courts have a concurrent jurisdiction over the same thing, whichever Court was first possessed of the cause has a right to proceed with it; <sup>6</sup> but there are some subjects which are only proper for the cognizance of the Court of Chancery, and upon those subjects it will always interfere; therefore, wherever there is a trust, or anything in the nature of a trust, it will stop the prosecution of a suit in the Ecclesiastical Courts for the payment of a legacy, not-

<sup>1</sup> *Grant v. Lathrop*, 3 Foster (N. H.) 67; *Kenyon v. Clarke*, 2 Rhode Isl. 67; *Shaw v. Dwight*, 16 Barb. (N. Y.) 536. In reference to the damages allowed in some States upon a dissolution of an injunction of this character, see *Taylor v. Morton*, 5 J. J. Marsh. 67; *Wilson v. McCullough*, ib. 363; *Griffin v. Pickett*, 6 J. J. Marsh. 389; *Brown v. Commonwealth*, ib. 653; *Washington v. Parks*, 6 Leigh, 581; *Howard v. Warfield*, 4 Harr. & M'Hen. 21; *Thomas v. Brashear*, 4 Monroe, 67; *Clayton v. Anthony*, 15 Grattan, 518; *Williams v. Close*, 14 La. An. 737.

<sup>2</sup> Woodeson's Lect. 406, 407, and Eden on Injunctions, 44.

<sup>3</sup> See *Forrester v. Wilson*, 1 Duer (N. Y.) 624; *Kent v. Ricards*, 3 Maryland Ch. Dec. 392. An injunction will be granted to prevent a party making use of a legal writ of execution for the purpose of vexation and injustice. *Colt v. Cornwell*, 2 Root, 109. Where an attorney brings a suit without any authority from the plaintiffs, and the defendant obtains a judgment for costs, a Court of Equity will restrain the enforcing of such judgment by a perpetual injunction, if it be shown that the attorney is poor and unable to respond. *Smyth v. Balch*, 40 N. Hamp. 363.

<sup>4</sup> See *Meredith v. Johns*, 1 Hen. & Munf. 583.

<sup>5</sup> On a motion for an injunction to restrain a bishop from passing sentence against a priest, the Court held, that the only ground on which the Court can exercise any jurisdiction in such a case is that the threatened action of the bishop may affect the civil rights of the priest. *Walker v. Wainwright*, 16 Barb. 486.

<sup>6</sup> *Nicholas v. Nicholas*, Prec. in Chan. 547.

withstanding those Courts have an original jurisdiction with regard to legacies: <sup>1</sup> accordingly it has interfered in this way, in cases where the bequest of a legacy involves the execution of trusts express or implied, or where the trusts in the bequests are themselves to be pointed out by the Court; for the construction of trusts and the execution of trusts cannot be enforced by the Spiritual Courts, any more than they can be enforced by the Courts of Common Law.<sup>2</sup> It has also interfered in this way, when a father is suing for a legacy bequeathed to an infant child; for the Court of Chancery can give proper directions for securing and improving the fund, which the Spiritual Courts are unable to do.<sup>3</sup> It has also interposed where a legacy has been given to a married woman, and the husband has instituted a suit for it in the Spiritual Courts; because those Courts have no authority to require him to make a suitable provision for the wife and her family as a Court of Equity has; and, therefore, to allow such suit to proceed would enable the husband to do an injustice to her rights and to defeat the equity to a settlement.<sup>4</sup> And so, although the Ecclesiastical Court is the proper jurisdiction to determine the validity of a will of personal estate, yet if the will comes into Chancery on an incident in the cause, and that incident or the will itself is admitted by the parties, it has been decided that the Court will hold the parties to be bound by such admission, and, if either of them should bring a new suit to contest that determination, it will grant an injunction to restrain them.<sup>5</sup>

An injunction to stay proceedings in the Admiralty Court, in a suit for the condemnation of a ship, has been refused, when it appeared that the Court of Admiralty, by its own rules, had as large an authority as the Court of Chancery to put the subject into a method of inquiry, and to act upon that inquiry by giving the same relief;<sup>6</sup> but if the proceedings in the Admiralty Court are in that stage in which no new evidence can be received, as —

<sup>1</sup> Anon. 1 Atk. 491.

<sup>2</sup> *Stonehouse v. Stonehouse*, 1 Dick. 98; *Smith v. Kempson*, 2 Dick. 769.

<sup>3</sup> *Nicholas v. Nicholas*, *ubi supra*; *Rotheram v. Fanshaw*, 3 Atk. 629; *Harrell v. Waldron*, 1 Vern. 26.

<sup>4</sup> *Tanfield v. Davenport*, Toth. 114; *Meals v. Meals*, 1 Dick. 373.

<sup>5</sup> *Sheffield v. The Duchess of Buckinghamshire*, 1 Atk. 628; *Gascoigne v. Chandler*, 3 Swanst. 418, n.

<sup>6</sup> Anon. 3 Atk. 350.

if a sentence has been obtained and an important fact has since been discovered, the Court of Chancery will restrain proceedings to enforce that sentence, considering it in the same light as if there had been a trial at Law and a verdict obtained, which may be affected in Equity by subsequent discovery.<sup>1</sup>

It may be mentioned here, that although this Court does not in general interfere with proceedings in the Court of Bankruptcy, which, as constituted by the 1 & 2 Will. IV. c. 56, is a Court of Equity as well as of Law, and therefore capable of doing justice between the parties in matters of equity; yet, it seems, that it will interfere to restrain proceedings, the effect of which may be to afford a foundation for a *fiat* in bankruptcy, in a case where such a proceeding would be contrary to Equity. Upon this principle an injunction issued to restrain a party from taking proceedings under the Insolvent Debtors' Act, (1 & 2 Vict. c. 110, s. 8,) by means of which an act of bankruptcy might have been deemed to have been committed by the plaintiff, or *fiat* awarded against him.<sup>2</sup>

In granting such an injunction, however, the Court does not of course direct or control the Courts; but, without respect to the subject-matter of dispute, it considers the equities between the parties, and decrees *in personam* according to those equities.<sup>3</sup> The

<sup>1</sup> *Jarvis v. Chandler*, T. & R. 319. See *Leycester v. Logan*, 3 K. & J. 446, 454.

<sup>2</sup> *Attwood v. Banks*, 2 Beav. 192. An injunction will be granted to stay proceedings under the insolvent law. *Beaty v. Beaty*, 2 John. Ch. 430.

<sup>3</sup> Story Eq. Jur. § 899; *Wharton v. May*, 5 Sumner's Vesey, 71, n. (a); *Eden Injunct.* (3d Am. ed.) 176, 177. The jurisdiction of the Court may be upheld, whenever the parties, or the subject, or such a portion of the subject, are within the jurisdiction, that an effectual decree can be made and enforced, so as to do justice. *Ward v. Arredondo*, 1 Hopk. 213. See *Mead v. Merritt*, 2 Paige, 404; *Mitchell v. Bunch*, 2 Paige, 606; *Lord Cranstoun v. Johnston*, 3 Sumner's Vesey, 170, note (a). It is now held, that whenever the parties are resident within a country, the Courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may require; and with that view, to order them to take, or to omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country. There is an exception to this doctrine, which has been long recognized in America; and that is, that the State Courts cannot enjoin proceedings in the Courts of the United States; nor the latter in the former Courts. *Rogers v. Cincinnati*, 5 McLean, 337. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective Courts

jurisdiction is not grounded upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the party, upon whom the order is made, being within the power of the Court; for if the Court, as in *Pen v. Lord Baltimore*,<sup>1</sup> can decree the performance of an agreement touching the boundary of a province in North America, or as in *Toller v. Carteret*,<sup>2</sup> can foreclose a mortgage in the Isle of Sark, or one of the Channel Islands, in like manner it can restrain the party, being within the limits of its jurisdiction, from doing anything abroad, whether the act forbidden be a conveyance or other act *in pais*, or the instituting or prosecuting of an action in a foreign Court.<sup>3</sup>

The only question, therefore, is, whether the ends of justice require that the Court of Chancery should interfere. This depends upon the special circumstances, such as whether the Court of Chancery has better means of determining both the law and the facts of the case,<sup>4</sup> or when two suits are instituted for the same matter, in all respects, and there has been a decree and adjudication in this country, or where there are questions in the cause, which must be decided according to the principles of equity before

being fully competent to administer entire relief in the suits pending therein. *Diggs v. Wolcott*, 4 Cranch, 179; *M'Kim v. Voorhes*, 7 Cranch, 279. But the like doctrine has been recently applied by the State Courts to suits and judgments in other American State Courts, where the latter are competent to administer the proper relief. *Mead v. Merritt*, 2 Paige, 402; *Bicknell v. Field*, 8 Paige, 440, 444. See *Mitchell v. Bunch*, 2 Paige, 606; 2 Story Eq. Jur. § 900; *Wilson v. Robertson*, 1 Tenn. 266. In *Williams v. Ayrault*, 31 Barb. (N. Y.) 364, it was held that an action cannot be maintained, in the Courts of this State, to enjoin the prosecution of an action pending in a Court of a sister State. But see *Dehon v. Foster*, 4 Allen, 550; *Ante*, 1726, 1727, note, and note 3 below.

<sup>1</sup> 1 Vea. 444.

<sup>2</sup> 2 Vern. 494.

<sup>3</sup> *Lord Portarlington v. Soulby*, 3 M. & K. 104; *Graham v. Maxwell*, 1 Mac. & Gor. 71; 2 Seton Dec. (3d Eng. ed.) 881. The Supreme Court of Massachusetts has jurisdiction in Equity, upon a proper case being made, to enjoin a citizen of Massachusetts from availing himself of an attachment of personal property in another State, in an action against a debtor who is insolvent under the laws of Massachusetts, and thus preventing the same from coming to the hands of the assignee; and it is no objection that the action was commenced before the institution of proceedings in insolvency, if this was done with knowledge that such proceedings were about to be instituted, and with a view to obtain a preference. *Dehon v. Foster*, 4 Allen, 545; S. C. 7 Allen, 57.

<sup>4</sup> *Bushby v. Munday*, 5 Mad. 297; *Bunbury v. Bunbury*, 1 Beav. 318.

it can appear whether the parties have a clear equitable as well as a legal title to the rights they claim.<sup>1</sup>

The next head proposed for consideration, in which an injunction will be granted, is, when it becomes necessary *to prevent waste or anything in the nature of waste*.<sup>2</sup> The inadequacy of the remedy at Common Law, as well to prevent as to give redress for waste, is so unquestionable, that a resort to the Courts of Law, for either of those purposes, has in a great measure fallen into disuse.<sup>3</sup> The remedy by a bill in Equity is much more easy, expeditious and complete; for relief will be given in Equity, where the remedies provided in the Courts of Common Law could not be made to apply; as where the titles of the parties are of a purely equitable nature, or where the parties have both legal titles and legal remedies, but irreparable mischief would be done, unless they were entitled to more immediate relief than that which they could obtain at Law, or where the parties committing the waste, with nothing but temporary and limited interests in the subject-matter, are maliciously and wantonly abusing those legal rights to the injury of those in remainder.<sup>4</sup>

<sup>1</sup> Booth v. Leycester, 1 Keen, 579; see also Lord Portarlington v. Soulby, 3 M. & K. 104; Booth v. Leycester, 3 M. & C. 459; Wedderburn v. Wedderburn, 4 M. & C. 585; Jones v. Geddis, 1 Ph. 724; Pennell v. Roy, 3 De G., Mac. & Gor. 126.

<sup>2</sup> See Downing v. Palmateer, 1 Munroe, 65; Ballou v. Wood, 8 Cush. 48; Shubrick v. Guerrard, 2 Desaus. 616. An injunction to restrain the executors from committing waste or selling the estate of the testator was granted. Wightman v. Brown, 1 Desaus. 166. Where the land of an insolvent debtor has been attached in a suit at law, he may be enjoined against waste during the pendency of such suit. Camp v. Bates, 11 Com. 51. It is competent for a Court of Equity to restrain by injunction the removal of what has been obtained by past waste. United States v. Parrott, 1 McAll. C. C. (Cal.) 271.

<sup>3</sup> An injunction to stay waste was refused where there appeared to be no impediment to the action of waste at law. Cutting v. Carter, 4 Hen. & Munf. 424. But see Scott v. Wharton, 2 Hen. & Munf. 25, where it was held, that no person is entitled to an injunction to stay waste, unless he can maintain an action at law for it. Both these positions are incorrect. See Kane v. Vanderburgh, 1 John. Ch. 11; Harris v. Thomas, 1 Hen. & Munf. 18.

<sup>4</sup> An injunction to stay waste or trespass may be granted in Maryland in any case, in which it would be granted according to the English authorities. Duvall v. Waters, 1 Bland, 576. An injunction may be granted in that State to stay waste pending an action at Law, or a suit in Equity to try the right. *Ib.*; Atty.-General v. Norwood, 1 Bland, 581; Coale v. Garrison, 1 Bland, 581; Flannagan v. Kips, 1 Bland, 582; Gittings v. Dew, 1 Bland, 583. See Ingraham v. Dun-

The most ordinary instance of the interposition of a Court of Equity, is by injunction to restrain the commission of waste by a tenant for life or years upon the application of the reversioner or remainderman, for an estate for life is always impeachable for waste, unless the contrary is pointed out by express limitation.<sup>1</sup> To redress this wrong, the only Common Law remedies are, — either an action of waste, or an action on the case in the nature of waste: the first of these remedies is given by the statutes of Marlbridge and Gloucester,<sup>2</sup> which, taken together, enabled the owner of the inheritance to recover the place wasted, together with treble damages, as an equivalent for the damage done to him. No person, however, could bring this action but he who had the immediate estate of inheritance expectant on the determination of the estate for life;<sup>3</sup> consequently, the remedy provided by these statutes was inapplicable to a vast variety of cases, and it therefore gave way to the second of these remedies, *i. e.*, to the action on the case, which might be brought by the person in reversion or remainder for life or years, as well as by a reversioner, &c.

nell, 5 Metcalf, 118; *Dana v. Valentine*, 5 Metcalf, 8; *Smith v. Collyer*, 8 Sumner's Vesey, 89, note (a); *Storm v. Mann*, 4 John. Ch. 21. But an injunction will not be issued to stay waste or nuisance, before a hearing on the merits, except in cases of urgent necessity, or where the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. *Charles River Bridge v. Warren Bridge*, 6 Pick. 376. In all cases where the right is doubtful, the Court will direct a trial, and in the mean time, if there be danger of irreparable mischief, or if there is any other good cause of granting a temporary injunction, it will be ordered, so as to restrain all injurious proceedings; and when the plaintiff's right is fully established, a perpetual injunction will be decreed. *Ingraham v. Dunnell*, 5 Metcalf, 126; 2 Story Eq. Jur. § 925, 926; *Perry v. Parker*, 1 Wood. & Minot, 280. If the thing sought to be prohibited is in itself a nuisance, the Court will interfere to stay irreparable mischief, without waiting for the result of a trial. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the Court will refuse to interfere, until the matter has been tried at law. Per Brougham, Lord Chancellor, *Ripon v. Hobart*, 1 Cooper Sel. Ca. 333; S. C. 3 My. & Keen, 169; *The Universities of Oxf. and Camb. v. Richardson*, 6 Sumner's Vesey, 689, note (a). See *Hart v. Mayor &c. of Albany*, 3 Paige, 213. An injunction to stay waste pending a suit to try the right, will not prevent the occupying tenant from making the ordinary uses of the land. *Duvall v. Waters*, 1 Bland, 584.

<sup>1</sup> *Cole v. Peyson*, Ch. Rep. 57.

<sup>2</sup> 52 Hen. III. c. 23; and 6 Edw. I. c. 5.

<sup>3</sup> 1 Inst. 53 b, and 218 b, n. 2; *Paget's Case*, Rep. pp. 5, 76 b.

in fee;<sup>1</sup> but as it has been determined that an action on the case will not lie for *permissive waste*,<sup>2</sup> and as it is certain that it cannot prevent the commission of *future waste*, an injunction in Equity, with its consequential account, is, in ordinary circumstances, the most usual and most efficacious mode of obtaining complete redress.<sup>3</sup> A tenant under a renewable lease forever may be restrained from committing waste.<sup>4</sup>

It is obvious, from the foregoing summary of the Common Law remedies, that, even if the Common Law remedy were more efficacious than it is, there are many persons who would be without redress if the Court of Equity did not interfere, — such as children unborn, and persons having contingent or executory interests.<sup>5</sup> Injunctions will accordingly be granted to protect the interests of a child *in ventre sa mère*;<sup>6</sup> of a contingent remainderman,<sup>7</sup> or of an executory devisee;<sup>8</sup> for if this protection were not given, it would be very easy to destroy the intention, as to timber in almost every settlement, whether by deed or will. There are also other cases where a person is punishable at Common Law for committing waste, and yet a Court of Equity will enjoin him: thus, it is clear, that where there is a tenant for life, with remainder to another life, with remainder over in tail or in fee, and the first tenant for life commits waste, the remainderman in tail or in fee can have no action of waste, — the reason of which is, that the plaintiff in the action must recover the place wasted; and that would be an injustice to the remainderman for life, whose estate is not forfeited, and if it should be recovered by the owner of the inheritance, (being under the limitation of the property), it would never go back again. But though the law allows no action of waste, in such a case, yet the Court of Chancery will sustain an injunction.<sup>9</sup> And not only will the Court of Chancery grant the

<sup>1</sup> Williams's Saunders, 252, n. 7.

<sup>2</sup> Herne v. Bembow, 4 Taunt. 764.

<sup>3</sup> Lord Red. 136; Gibson v. Smith, 2 Atk. 183; for an account of the Common Law remedies, see Jefferson v. Bishop of Durham, 1 Bos. & Pull. 120.

<sup>4</sup> Coppergin v. Eastburn, 3 J. & Lat. 397.

<sup>5</sup> Brashear v. Macey, 3 J. J. Marsh. 93.

<sup>6</sup> Robinson v. Litton, 3 Atk. 211; Luttrell's Case, cited Prec. in Ch. 50.

<sup>7</sup> Williams v. Duke of Bolton, 3 P. Wms. 268, n.

<sup>8</sup> Hayward v. Stillingfleet, 1 Atk. 425; Robinson v. Litton, 3 Atk. 209; and see Stansfield v. Habergham, 10 Ves. 273.

<sup>9</sup> Boswell's Case, 1 Rolls, Ab. 377; Tracy v. Tracy, 1 Vern. 23; Abraham v.

injunction upon the application of the remainderman in fee, but it will also grant it upon the application of the *mesne* remainderman for life ;<sup>1</sup> for though he has no right to the timber, yet if the first tenant for life should die, he would have an interest in the mast and shade ;<sup>2</sup> but, if the timber has been cut, he cannot maintain a bill for an account of the proceeds, which belong only to the owner of the inheritance.<sup>3</sup> It is upon the like principle, also, that Lord Hardwicke granted an injunction at the suit of a ground landlord, to stay waste in an under lessee ;<sup>4</sup> and an injunction has also been obtained against a tenant from year to year, after a notice to quit, to restrain him from taking away the crops or sowing the land with a pernicious seed, in a manner which was contrary to the usual course of husbandry.<sup>5</sup>

A Court of Equity will also restrain waste where the titles of the parties are of a purely equitable nature : thus, in the case of mortgages, if the mortgagor in possession should attempt to cut down timber, and the land without the timber is an insufficient or scanty security, a Court of Equity will restrain him ;<sup>6</sup> for, as the whole estate is a security for the money advanced, the mortgagor, under such circumstances, ought not to be suffered to lessen or diminish it ;<sup>7</sup> and so it is the duty of trustees who are appointed to preserve contingent remainders, to protect the entire inheritance for the benefit of all *the cestuis que trust* in remainder, whether vested or contingent ; and as, in many instances, the value of that inheritance consists as much of the mines and

Bubb, Freem. 53 ; Garth v. Cotton, 1 Dick. 205, 208 ; *In re Skringley*, 3 Mac. & Gor. 224.

<sup>1</sup> Mayo v. Foster, 2 M'Cord Ch. 143 ; Kane v. Vanderburgh, 1 John. Ch. 11.

<sup>2</sup> Dayrell v. Champnets, 1 Eq. Ca. Ab. 400 ; Mollineaux v. Powell, 3 P. Wms. 268, n. ; Perrot v. Perrot, 3 Atk. 94 ; Davis v. Leo, 6 Ves. 787.

<sup>3</sup> Lushington v. Boldero, 15 Beav. 1.

<sup>4</sup> Farrent v. Lovell, 3 Atk. 723 ; S. C. Amb. 105, *sub nom.* Farrent v. Lee.

<sup>5</sup> Onslow v. —, 16 Ves. 173 ; Pratt v. Brett, 2 Mad. 62 ; see Duke of St. Albans v. Skipwith, 8 Beav. 354.

<sup>6</sup> See Scott v. Wharton, 2 Hen. & Munf. 25 ; Downing v. Palmateer, 1 Monroe, 65 ; Brady v. Waldron, 2 John. Ch. 148 ; Murdock's Case, 2 Bland, 461 ; Robinson v. Preswick, 3 Edw. 246. Where the land of an insolvent debtor has been attached, in a suit at law, it is competent to a Court of Chancery, during the pendency of such suit, to enjoin him against waste. Camp v. Bates, 11 Conn. 51 ; Powers v. Heery, R. M. Charlt. 523.

<sup>7</sup> Usborne v. Usborne, 1 Dick. 75 ; Hippeley v. Spencer, 5 Mad. 422 ; Humphreys v. Harrison, 1 J. & W. 581 ; see Goodman v. Kine, 8 Beav. 399, where mortgagors were restrained after a foreclosure decree.

timber as it does of the land, they may, by force of their trust, have their remedy by injunction, to prevent the destruction of the one or the exhaustion of the other.<sup>1</sup> Under this head, we may also class those cases where persons are contracting for leases and other interests in property which they are only in possession of by virtue of the contract; in such cases, if the plaintiff has no legal title, he has no redress at Law, but if he has such a contract as will authorize him to call upon the Court to clothe the possession with the legal title, and the answer admits such contract, the injunction will be granted.<sup>2</sup>

An injunction will also be granted, in some cases, where the parties have both legal titles and legal remedies, but irreparable mischief would be done unless they were entitled to more immediate relief than that which they would obtain at Law;<sup>3</sup> it has accordingly been granted where the injunction amounted in fact to an injunction to stop a trespass; for, if the Court would not interfere against a trespasser, he might go on by repeated acts of damage which would be absolutely irremediable.<sup>4</sup> The original

<sup>1</sup> *Garth v. Cotton*, 1 Dick. 183; *Stansfield v. Habergham*, 10 Ves. 273; *Pugh v. Vaughan*, 12 Beav. 517.

<sup>2</sup> *Norway v. Rowe*, 19 Ves. 155.

<sup>3</sup> 2 Seton Dec. (3d Eng. ed.) 897, 898.

<sup>4</sup> *Deere v. Guest*, 1 M. & C. 516; *Greenhalgh v. Manchester Railway Company*, 3 M. & C. 784; *Winnipissiogee Lake Co. v. Worster*, 9 Foster (N. H.) 433, 447; *Davis v. Reed*, 14 Maryland, 152; *Scheetz's Case*, 35 Penn. (State) 88; *Thomas v. James*, 32 Alabama, 723. *Powers v. Heery*, R. M. Charl. 523, 524; *New York Printing Co. v. Fitch*, 1 Paige, 97; *Livingston v. Livingston*, 6 John. Ch. 497; *Jerome v. Ross*, 7 John. Ch. 315; 2 Story Eq. Jur. § 928, § 929; *Attaquin v. Fish*, 5 Metcalf, 148; *Eden Injunct.* (2d Am. ed.) 229, 330 to 234; *Robinson v. Lord Byron*, 1 Bro. C. C. (Perkins's ed.) 588, 589, notes (a) and (b), and cases cited; *Putnam v. Valentine*, 5 Ohio, 187. The practice of issuing injunctions in cases of trespass, on the principle of irreparable mischief, has now become extremely common. *Hanson v. Gardiner*, 7 Sumner's Vesey, 305 b, note (c), and cases cited. But an injunction will not be granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. *Jerome v. Ross*, 7 John. Ch. 315; *Stevens v. Beekman*, 1 John. Ch. 318; *Amelung v. Seekamp*, 9 Gill & John. 468; *Smith v. Pettingill*, 15 Vermont, 82; *Hart v. Mayor, &c. of Albany*, 3 Paige, 213; *Ross v. Page*, 6 Ohio, 166; *Herr v. Bierbower*, 3 Maryland Ch. Dec. 456; *Carlisle v. Stevenson*, 3 Maryland Ch. Dec. 499; *Chesapeake & Ohio Co. v. Young*, 3 Maryland, 480; *Brooks v. Dias*, 35 Alabama, 599. The mere allegation of danger of a great and irreparable injury is not enough; facts must be stated to satisfy the Court of the existence of a danger of that kind.

distinction was, that if a person still living committed a trespass, by cutting timber or taking lead ore, or digging for coal, the Court would not interfere, except so far as to give a discovery, and then an action might be brought for the value discovered; but if the person died, then, since the trespass died with him, the Court has said it would decree an account, though the law provided no remedy. Throughout Lord Hardwicke's time and down to that of Lord Thurlow, the distinction between waste and trespass was thus acknowledged;<sup>1</sup> Lord Thurlow himself acted upon the same principle, saying, that the person to be enjoined was a mere stranger, and he ought to be turned out of possession immediately.<sup>2</sup>

The Court will likewise interfere by injunction, where the parties committing the waste, with nothing but temporary and limited interests in the subject-matter, are maliciously and wantonly abusing their legal rights to the injury of those in remainder; this is commonly called equitable waste, which may be defined to be the commission of such acts as at Law would not be esteemed, under the circumstances of the case, to be waste, but which are so esteemed in the view of a Court of Equity, from their manifest injury to the inheritance, though not inconsistent with the legal rights of the party committing them. Thus, for example, it was held, in *Lewis Bowle's case*,<sup>3</sup> that if there be a tenant for life without impeachment of waste, he had as great a power to do waste, and to convert it at his own pleasure, as a tenant in fee or a tenant in tail had, so that if any trees were severed from the inheritance, either by the act of the party or by the act of Law, and became chattels, the whole property in them was in the tenant for life, by force of the said clause. The necessary consequence of this doctrine was, that a tenant for life without impeachment of

*Branch Turnp. Co. v. Yuba*, 13 Calif. 190. And therefore an omission of the charge of irreparable mischief would not be a defect in a bill for an injunction otherwise good. *Davis v. Reed*, 14 Maryland, 152. See *Bolster v. Catterlin*, 10 Ind. 117; *De Witt v. Hayes*, 2 Cal. 463; *Cornelius v. Post*, 1 Stockt. (N. J.) 196.

<sup>1</sup> *Thomas v. Oakley*, 18 Ves. 186.

<sup>2</sup> *Mortimer v. Cottrell*, 2 Cox, 205; and see *Flamang's Case*, cited or referred to 6 Ves. 147; 7 Ves. 308; 15 Ves. 138; 18 Ves. 186; *Mitchell v. Dors*, 6 Ves. 147; *Crockford v. Alexander*, 15 Ves. 138; *Thomas v. Oakley*, 18 Ves. 186; *Smith v. Pettingill*, 15 Vermont, 82. For injunction to stay defendants destroying family graves, and removing or defacing tombstones, or obliterating inscriptions thereon, in burial-grounds attached to a chapel, see *Moreland v. Richardson*, 24 Beav. 33, note.

<sup>3</sup> 11 Rep. 80.

waste, could not in any case be restrained, in Equity, from cutting timber upon the estate, for that would have been to determine that he should not enjoy the property which the Law gave him.<sup>1</sup> It was, however, soon found, that this extensive power might be wantonly and capriciously abused to the prejudice of the inheritance; and, accordingly, where a tenant for life, unimpeachable of waste, was making an unconscientious use of that power, the Courts of Equity assumed the jurisdiction of restraining and modelling it.<sup>2</sup> Thus it has interfered by injunction where the tenant for life was pulling down a castle,<sup>3</sup> or the family mansion, or farm houses.<sup>4</sup> It will also interfere where he is cutting down timber of too young growth,<sup>5</sup> or where he is cutting down trees which were planted or growing or designedly left for ornament or shelter.<sup>6</sup> This principle has even been extended to plantations, vistas, avenues and rides,<sup>7</sup> and to trees which are either planted to shut out an object,<sup>8</sup> or merely for the benefit of a view.<sup>9</sup> In some of these cases, the kind of waste has been called, by the Judges, *extravagant, humorsome waste*; in others, as *voluntary, malicious, intended waste*; in others again as *wanton and wilful waste*; in all of them, in short, it was the improper and abusive exercise of a legal power to the detriment of those in remainder.<sup>10</sup> The Court will not, however, interfere in the case of permissive waste.<sup>11</sup>

Tenants in tail, after the possibility of issue extinct, have the

<sup>1</sup> *Aston v. Aston*, 1 Ves. 265, 266.

<sup>2</sup> See *Kane v. Vanderburgh*, 1 John. Ch. 11.

<sup>3</sup> *Vane v. Lord Barnard*, 2 Vern. 738; S. C. Prec. in Ch. 454, *sub nom.* Lord Barnard's Case.

<sup>4</sup> *Aston v. Aston*, 1 Ves. 265. A tenant was stayed pulling down a house and building another. *Smyth v. Carter*, 18 Beav. 78.

<sup>5</sup> *Obrien v. Obrien*, Amb. 107; *Chamberlyne v. Dummer*, 1 Bro. C. C. 166; *Strathmore v. Bowes*, 2 Bro. C. C. 88.

<sup>6</sup> *Packington's Case*, 3 Atk. 215; *Williams v. M'Namara*, 8 Ves. 70; *Morris v. Morris*, 15 Sim. 505; *Wellesley v. Wellesley*, 6 Sim. 497. Felling timber not for necessary repairs has been enjoined. See *Marlboro v. St. John*, 5 D. & S. 174.

<sup>7</sup> *Lord Tamworth v. Lord Ferrers*, 6 Ves. 419.

<sup>8</sup> *Day v. Merry*, 16 Ves. 375.

<sup>9</sup> *The Marquis of Downshire v. Lady Sandys*, 6 Ves. 107.

<sup>10</sup> A devisee for life was restrained from cutting down the trees from the woodland of the estate and from planting the new grounds. *Smith v. Poyas*, 2 Desaus. 65. So from using the timber for any other purpose than for fuel, fencing, &c. *Ibid.*

<sup>11</sup> *Powys v. Blagrove*, 4 De G., Mac. & Gor. 448.

same powers and are subject to the same restrictions as tenants for life without impeachment of waste ; and it makes no difference that they are unimpeachable of waste, not by the provision of the grantor, but as a legal incident to their estate.<sup>1</sup>

It is to be remarked, that the object of the Court's interference in granting an injunction to stay this kind of waste is not by way of satisfying a damage, but in order to prevent a wrong, and, therefore, a person cannot come into Equity merely for an account, unless where the waste is of that nature that the plaintiff has no remedy at Law : the account depends entirely upon the injunction ; it is incidental to and consequential upon it ; and, if a person is entitled to the one, he is entitled to the other also, on the principle of preventing a multiplicity of suits ; for, otherwise, he would be obliged to bring his action at Law as well as his bill in Equity, — his action by way of satisfaction, his bill by way of prevention ;<sup>2</sup> and therefore an account has been granted with respect to equitable waste after the death of the person who committed the waste.<sup>3</sup>

There is therefore distinction, when the party who commits the waste dies, between those cases where the waste was legal and those cases where the waste was equitable. There is no instance of a decree against assets for an account of legal waste ; since, so far as the act of the offender was beneficial, his assets would be answerable at Law, and his executor would be charged ;<sup>4</sup> and as at Law, if legal waste be committed and the party dies, an action for money had and received will lie against his representatives ; so, upon the same principle, or rather by analogy thereto, if equitable waste be committed, and the party dies, he must, through his representatives, refund in respect of the wrong he had done, and not retain the produce of his injury, which is recoverable in no other Court.<sup>5</sup>

The Court will interfere, by injunction, to suppress the com-

<sup>1</sup> Freem. 53 ; *Attorney-General v. Duke of Marlborough*, 3 Mad. 539 ; *Williams v. Williams*, 15 Ves. 419.

<sup>2</sup> *Jesus College v. Bloom*, 3 Atk. 263 ; *S. C. Amb.* 54 ; *Duke of Leeds v. Earl Amherst*, 2 Ph. 117 ; and see *Lushington v. Boldero*, 15 Beav. 1 ; *Duvall v. Waters*, 1 Bland, 576.

<sup>3</sup> *Garth v. Cotton*, 1 Dick. 183.

<sup>4</sup> *Hambly v. Trott*, Cowp. 876.

<sup>5</sup> *Marquis of Lansdown v. March, Dowager of Lansdown*, 1 Mad. 116 ; *Bishop of Winchester v. Knight*, 1 P. Wms. 406.

mission or continuance of a nuisance.<sup>1</sup> Nuisances are of two kinds,—those which are injurious to the public at large, and those which are injurious to the rights and interests of private persons.

With regard to public nuisances, the jurisdiction seems to be of very ancient date, and to be founded on the irreparable damage to individuals or the great public injury which is likely to ensue. The jurisdiction is applicable not only to *nuisances* strictly so called, but also to *purprestures*. By *purpresture* is meant, in its present acceptation, an encroachment upon the Crown, either upon part of the demesne lands, or upon the high roads, rivers, forts or streets; and the difference between *purprestures* and nuisances consists in this, that where the *jus privatum* of the Crown is invaded it is a *purpresture*, but where the *jus publicum* is violated it is a *nuisance*.<sup>2</sup>

In cases of *purpresture* the remedy is either by information for an intrusion at the Common Law, or by information in Equity at the suit of the Attorney-General.<sup>3</sup>

<sup>1</sup> *Boston & Lowell R. R. Corp. v. S. & L. R. R. Co.* 2 Gray, 1, 27, 28; *Charles River Bridge v. Warren Bridge*, 6 Pick. 376; S. C. 7 Pick. 344; *Sprague v. Rhodes*, 4 Rhode Isl. 301. The Court enjoins what will clearly end in nuisance; if this is uncertain, the motion will be refused with costs. *Haine v. Taylor*, 2 Ph. 209; 10 Beav. 75, 77, 79, 80. What is nuisance is chiefly a subject for a jury, and to be ascertained by an action, before granting relief; see *Attorney-General v. U. K. Elec. Tel. Co.*, 5 L. T. N. S. 328; 2 Seton Dec. (3d Eng. ed.) 898; *Cleeve v. Mahany*, 9 W. R. 882.

As to the effect of acquiescence in a nuisance preventing the interference of the Court for or against a party, see *Bankhart v. Houghton*, 27 Beavan, 425, 428; 2 Seton Dec. (3d Eng. ed.) 898, 899; *Attorney-General v. Sheffield &c. Co.*, 3 D. M. & G. 304, 314, 322, 330.

Having one's rest disturbed is a nuisance, though compensable by damages; depreciation of property is not a nuisance. *White v. Cohen*, 2 Drew, 312. Burning bricks on one's own ground was stayed as a nuisance. *Walter v. Selfe*, 4 D. & S. 315, 320, 325; *Grafton v. Hilliard*, 4 D. & S. 326; *Pollock v. Lester*, 11 Hare, 266, 275. Holding a regatta on a reservoir, on which rights of fishing and sporting were reserved, was held a nuisance. *Bostock v. N. Staff. Ry.* 5 D. & S. 584; 3 S. & G. 283. And a cattle fair on a recreation ground was enjoined. *Attorney-General v. Mayor, Southampton*, 1 Gif. 363, 365, 366. Leaving open or opening sewers into a main road sewer, while running into a canal, was enjoined. *Manchester Ry. v. Workshop Bd.* 23 Beav. 198, 206, 208, 211. See *Case v. M. R. Co.*, 27 Beavan, 247, 252; *Oldaker v. Hunt*, 6 D. M. G. 376, 388; 19 Beav. 485; 2 Seton Dec. (3d Eng. ed.) 899, 900.

<sup>2</sup> 2d Inst. 38, 272; Harg. Law Tracts, 84, 87.

<sup>3</sup> *Attorney-General v. Richards*, 2 Anst. 603; *Attorney-General v. Johnson*, 2 J. Wil. 87; *Rex v. Earl Grosvenor*, Starkie's N. P.

In cases of public nuisance, properly so called, an indictment lies to abate them, and to prosecute the offender; but an information will also lie in Equity to stop the mischief and to restrain the continuance of it.<sup>1</sup> Thus Lord Cottenham held, that there was a clear jurisdiction in a Court of Equity, to restrain the magistrates of a county from doing that which would have been a nuisance to a public road.<sup>2</sup>

In informations and proceedings in cases of public nuisance, the Attorney-General may take on himself to sue as representing the public;<sup>3</sup> but individuals who conceive themselves aggrieved may also come forward and ask the assistance of the Court to prevent a public nuisance from which they have individually sustained damage;<sup>4</sup> and in the event of an individual suffering peculiar and special damage by a public nuisance, a suit may be sustained by him without making the Attorney-General a party.<sup>5</sup>

With regard to *private nuisances*, the Court will interfere by way of injunction where the mischief is irreparable.<sup>6</sup> The general ground of its interference is that sort of material injury to

<sup>1</sup> *Mayor of London v. Bolt*, 5 Ves. 129; *Attorney-General v. Nichol*, 16 Ves. 338.

<sup>2</sup> *Attorney-General v. Forbes*, 2 M. & C. 124; *Turner v. Blamire*, 1 Drew. 402.

<sup>3</sup> *Elmherst v. Spencer*, 2 Mac. & Gor. 45.

<sup>4</sup> *Attorney-General v. Forbes*, 2 M. & C. 123. See *Rowe v. Granite Bridge*, 21 Pick. 344; *Corning v. Lowerre*, 6 John. Ch. 439; *Hamilton v. Whitridge*, 11 Maryland, 128. But a bill for an injunction against a public nuisance will not be sustained, unless it shows a particular injury to the plaintiff, distinct from that which he suffers in common with the rest of the public. *Bigelow v. The Hartford Bridge Co.* 14 Conn. 565.

An owner of lots upon a street, upon which a railway is about to be constructed, which will be specially injurious to him, may maintain a suit to enjoin such construction. *Milhan v. Sharp*, 28 Barb. (N. Y.) 228. In *Hamilton v. Whitridge*, 11 Maryland, 128, it was held, that parties, suffering special damage in the value and use of their property, may have an injunction to restrain the owner of an adjoining house from its contemplated use as a house of prostitution.

<sup>5</sup> *Soltau v. Du Held*, 2 Sim. N. S. 133.

<sup>6</sup> *Winnipissiopee Lake Co. v. Worster*, 9 Foster (N. H.) 433; *Ingraham v. Dunnell*, 5 Metcalf, 118; *Davis v. Reed*, 14 Maryland, 152; *Webber v. Gage*, 39 N. Hamp. 182; *Middleton v. Franklin*, 3 Calif. 328; *Dana v. Valentine*, 5 Metcalf, 8. See *Boston Water Power Co. v. Boston & Worcester R. R. Corp.* 16 Pick. 512, 525; *Bigelow v. The Hartford Bridge Co.* 14 Conn. 565; *Perry v. Parker*, 1 Wood. & Minot, 283; *Cunningham v. Rome R. R. Co.* 27 Georgia, 499.

property or health requiring the application to prevent, as well as remedy, an evil, for which damages more or less would be given in an action at Law.<sup>1</sup> It is not every case that would furnish a right of action against a party which would justify the interposition of the Court of Equity to redress the mischief or remove the annoyance.<sup>2</sup> But there must be such an injury as from its nature is not susceptible of being adequately compensated for by damages, or such as, from its long continuance, occasions a constantly-recurring grievance which cannot be otherwise prevented but by an injunction.<sup>3</sup> Thus it has been said, that every common trespass or a mere diminution of the value of the premises is not a ground for an injunction; but, if the trespass continue so long as to become a nuisance, or if the diminution of the value of the premises amount to irreparable mischief, then the Court will undoubtedly interfere.<sup>4</sup>

The Court frequently exercises this jurisdiction where it restrains a party from building so near the plaintiff's house as to darken his *ancient lights*.<sup>5</sup> Injunctions have also been granted to

<sup>1</sup> *Attorney-General v. Nichol*, 16 Ves. 343.

<sup>2</sup> An owner of vacant land, which is intended for house lots, is not entitled to an injunction to restrain the exercise of an offensive trade in the vicinity thereof, whereby its value is diminished. Such owner has a complete and adequate remedy at law for the injury so caused. *Dana v. Valentine*, 5 Metcalf, 8.

<sup>3</sup> *Fishmongers' Company v. East India Company*, 1 Dick. 163; *Elmherst v. Spencer*, 2 Mac. & Gor. 45; *Attorney-General v. Sheffield Gas Consumers Company*, 3 De G., Mac. & Gor. 304; *Ingraham v. Dunnell*, 5 Metcalf, 118; 2 Story Eq. Jur. § 925; *Mohawk & Hudson Rail R. Co. v. Artcher*, 6 Paige, 83; *Jerome v. Ross*, 7 John. Ch. 315; *Hart v. Mayor &c. of Albany*, 3 Paige, 213; *Webber v. Gage*, 39 N. Hamp. 182, 186, 187, 188; *Burnham v. Kempton*, 44 N. Hamp. 97; *Olmstead v. Loomis*, 6 Barb. S. C. 152; *Lyon v. McLaughlin*, 32 Vermont, 423.

<sup>4</sup> *Coulson v. White*, 3 Atk. 21; and see *Attorney-General v. Nichol*, 16 Ves. 342; *White v. Cohen*, 1 Drew. 312; *Johnston v. Hall*, 2 Kay & J. 414.

<sup>5</sup> *Ryder v. Bentham*, 1 Ves. 543; *Back v. Stacey*, 2 Russ. 121; *East India Company v. Vincent*, 2 Atk. 83; *Attorney-General v. Nichol*, 16 Sumner's Vesey, 338, note (a); 2 Story Eq. Jur. § 926, 927; *Eden Injunct.* (2d Am. ed.) 270; *Wilson v. Cohen*, 1 Rice Eq. 80; 2 Seton Dec. (3d Eng. ed.) 894; *Potts v. Levy*, 2 Drew. 272, 278, 279. In *Atkins v. Chilson*, 7 Metcalf, 398, it was held that a lessor is not entitled during the continuance of the lease, to an injunction to restrain the lessee from obstructing and darkening windows in the demised tenement, unless the injury will probably be irreparable, or cannot be compensated by damages recovered in a suit at law.

stop the diversion of watercourses;<sup>1</sup> and to prevent the pulling down of banks of rivers, whereby the plaintiff is exposed to inundations from which the banks had protected him.<sup>2</sup>

Lord Cottenham upon several occasions explained the nature of the jurisdiction of a Court of Equity in cases of this description, where a party sued in respect of an alleged injury to his legal rights. In such cases, it seems that when an injunction is granted, the Court proceeds solely upon the principle of preserving property until a legal decision on the rights can be had.<sup>3</sup> In order to entitle the plaintiff to such an interference for the purpose of protecting his property, pending the decision of his legal title, he must show at least a strong *prima facie* case in support of the title which he asserts, and it is also necessary for him to show that he

<sup>1</sup> *Webb v. The Portland Manuf. Co.* 3 Sumner, 189; *Dexter v. Providence Aqueduct Co.* 1 Story, 387.

<sup>2</sup> *Robinson v. Lord Byron*, 1 Bro. C. C. (Perkins's ed. notes) 588; *Lane v. Newdigate*, 10 Ves. (Sumner's ed. notes (a) and (b) and cases cited) 194; *Chalk v. Wyatt*, 3 Mer. 688; *Harvey v. Smith*, 1 Kay & J. 389; *Eden Injunct.* (2d Am. ed.) 232, 233, 269; *Gardner v. Newburg*, 2 John. Ch. 162; *Van Bergen v. Van Bergen*, 2 John. Ch. 272; *Belknap v. Belknap*, 2 John. Ch. 463; *Hammond v. Puller*, 1 Paige, 197; *Belknap v. Trimble*, 3 Paige, 577, 601; *Reid v. Gifford*, 1 Hopk. 416; S. C. 6 John. Ch. 19; 2 Story Eq. Jur. § 927; *Robinson v. Lord Byron*, 1 Bro. C. C. (Perkins's ed.) 588, 589, and notes; *Burnham v. Kempton*, 44 N. Hamp. 78, 101; *Winnipissiopee Lake Co. v. Worster*, 9 Foster (N. H.) 448; *Ballou v. Hopkinton*, 4 Gray, 324; *Bemis v. Upham*, 13 Pick. 169; *Hill v. Sayles*, 12 Cush. 454; *Bardwell v. Ames*, 22 Pick. 353. Equity will restrain the obstruction of a mill privilege by another mill on the same stream. *Crittenden v. Field*, 8 Gray, 621; *Sheldon v. Rockwell*, 9 Wiscon. 166. An injunction was granted in Massachusetts to restrain the owner of one half of an ancient solid party-wall, long used for the support of buildings erected on each side of it, from cutting away a portion of its face, and erecting a new wall upon his own land at a distance of two inches from that portion of the ancient wall which is left standing, and connected with it by occasional projecting bricks and ties. *Phillips v. Boardman*, 4 Allen, 147.

It is within the jurisdiction of a Court of Equity in New Hampshire, to restrain, by injunction, a citizen of that State from injuring the real estate of the plaintiffs, though situated out of the State. *Great Falls Manuf. Co. v. Worster*, 3 Foster (N. H.), 462.

<sup>3</sup> The object of an injunction before answer is to preserve all things in their then condition; not to determine any right by anticipation, or to undo or restore anything. *Murdock's Case*, 2 Bland, 461; 2 Seton Dec. (3d Eng. ed.) 874. Courts of Equity will not ordinarily take upon themselves to decide the fact that a nuisance exists, when that fact is controverted, but will require that the party, asking the interference of the Court, shall first establish his right at law. *Burnham v. Kempton*, 44 N. Hamp. 78.

has not been guilty of an improper delay in applying for the interposition of the Court,<sup>1</sup> not acquiescence in the sense of conferring a right on another party, but acquiescence in the sense of depriving him of the right to the interference of a Court of Equity. The Court has then to consider the degree of inconvenience and expense to which granting the injunction would subject the defendant in the event of his being in the right;<sup>2</sup> and, on the other hand, the nature of the injury which the plaintiff may sustain in the event of his complaint turning out to be well founded, and the Court refusing to interfere, pending the decision of the question at Law; and thus balancing the question between the two parties, and the extent of inconvenience likely to be incurred on the one side and on the other, the Court must exercise its discretion whether the injunction should be granted or withheld;<sup>3</sup> should the Court in the exercise of this discretion determine upon grant-

<sup>1</sup> The plaintiff can be relieved by an injunction only in cases where he has exercised due precaution to prevent an injury. *Russ v. Wilson*, 22 Maine, 211. As to the effect of delay, or laches, or neglecting remedies, or acquiescing in or encouraging the acts complained of, see *Buxton v. James*, 5 D. & S. 80; *Atty.-Genl. v. Eastlake*, 11 Hare, 205, 228; *Pillow v. Thompson*, 20 Texas, 206; *Hart. Dig. Art. 1599*; *Tash v. Adams*, 10 Cush. 252; *Fuller v. Melrose*, 1 Allen, 166; *Borland v. Thornton*, 12 Calif. 440; *Gray v. Ohio and Pennsylv. R. R. Co.* 1 Grant Cas. (Penn.) 412; *Briggs v. Smith*, 5 Rhode Isl. 213; *Phelps v. Peabody*, 7 Calif. 50; *Little v. Price*, 1 Maryland Ch. Dec. 182; *Burden v. Stein*, 27 Ala. 104; *Buxton v. James*, 5 D. & S. 80; *Atty.-Genl. v. Eastlake*, 11 Hare, 205, 228.

For the principles of refusing injunctions on original motion, or on appeal, for laches, and the effect of objection or protest, see *G. W. Ry v. Oxford, &c.* 3 D. M. G. 341, 355, 356, 359, 360, 363; *Atty.-Genl. v. Sheffield*, 3 D. M. G. 327, 328; *Coles v. Sims, Kay*, 56; 5 D. M. G. 1; 2 Seton Dec. (3d Eng. ed.) 871, 872.

<sup>2</sup> See *Wing v. Fairhaven*, 8 Cush. 363.

<sup>3</sup> *Hinton v. Earl of Granville*, Cr. & Ph. 283; *Haines v. Taylor*, 2 Phil. 209; 2 Mac. & Gor. 146; 10 Beav. 75; *Standish v. Corp. of Liverpool*, 1 Drew. 1; 2 Seton Dec. (3d Eng. ed.) 874; *Stevens v. Keating*, 2 Phil. 333; *Hodgson v. Earl Powis*, 1 De G., Mac. & Gor. 6; and see 3 Mac. & Gor. 70; *Ingraham v. Dunnell*, 5 Metcalf, 123 to 127; *Hartridge v. Rockwell*, R. M. Charl. 260; *Reed v. Dews*, ib. 365.

An owner of a mill on a watercourse cannot maintain a bill in Equity to restrain a riparian proprietor above from cutting ice in his pond on the same stream, until the rights of the parties have been determined at law. *Cummings v. Barrett*, 10 Cush. 186. See *Burnham v. Kempton*, 44 N. Hamp. 78. It is the duty of the Court rather to protect acknowledged rights than to establish new and doubtful ones. *Burnham v. Kempton*, 44 N. Hamp. 92; *Booth v. Driscoll*, 20 Conn. 555.

ing the injunction, it will, in all cases where the legal title is disputed, put the parties in the position of speedily obtaining a decision at Law upon their right; and whether the parties themselves apply for it or not, it is a fundamental objection to an order for an injunction in a case of this kind, if it is made without some provision for putting the question in a course of legal investigation.<sup>1</sup> Moreover, when the Court has thus interfered by granting an injunction, and put the plaintiff upon the terms of bringing an action to decide his legal rights against the defendant, the Court will deprive the plaintiff of the benefit of this injunction, if he is unnecessarily dilatory in proceeding with the action, and the defendant has not been a party to the delay.<sup>2</sup> Since these observations of Lord Cottenham, some changes have taken place in the Law, which may affect the future practice on the subject to which he refers. In the first place, by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 79, "In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as thereinbefore provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right"; and by the 82d section, "The plaintiff may at any time after the commencement of the action, and whether before or after judgment, apply *ex parte* to the Court or a Judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right."<sup>3</sup>

<sup>1</sup> Harman v. Jones, Cr. & Ph. 299; Sanster v. Foster, Cr. & Ph. 302; Burnham v. Kempton, 44 N. Hamp. 78, 97.

<sup>2</sup> Bickford v. Skewes, 4 M. & C. 498. If a case stands over for a party to proceed at law, and he does not, the legal right is taken against him. Cooper v. Joel, 27 Beav. 313. See, also, 2 Seton Dec. (3d Eng. ed.) 998, 999, 1000.

<sup>3</sup> Injunctions obtained on an application *ex parte*, to continue until the further order of the Court, or some Judge thereof, under the early practice of the Court in Massachusetts, were granted with considerable facility, on the ground that, being *ex parte*, it would not affect the merits of an ultimate hearing, and that if its operation were considerably injurious to the defendants, it was competent for them to move to dissolve it on affidavit, on application to any Judge, upon short

Moreover, by the 83d section, "The defendant is enabled to plead equitable grounds of defence." The result is, that in cases to which the Act applies, that is to say, "cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action," there is now ample redress at Law, and consequently the reason for the original equitable jurisdiction has ceased.

A power of a similar kind has been given in some other instances to a Court of Common Law. By the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 81, s. 3, "A Court or Judge may issue a writ of 'Injunction or Interdict,' restraining any Company subject to the Act from violations or contraventions of the Act"; and by the 15 & 16 Vict. c. 83, s. 42, "The Judge in patent cases may make an order for an injunction, inspection or account." It must not, however, be supposed that this new jurisdiction at Common Law destroys the original equitable jurisdiction, although it undoubtedly diminishes its importance and necessity. Even if no additional powers had been conferred upon a Court of Equity, it would still have retained its original right to issue injunctions in such cases, but there have been some important additional powers conferred upon Courts of Equity, which have materially improved its jurisdiction on these and similar subjects. Whilst, on the one hand, Courts of Common Law have been enabled to give relief heretofore exclusively within the powers of a Court of Equity, on the other hand, Courts of Equity have been empowered, when necessary, to decide legal questions. By the 62d section of 15 & 16 Vict. c. 86, "In cases where, according to the present practice of the Court of Chancery, such Court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at Law, the said Court will itself determine such legal title or right without requiring the parties to proceed at Law to establish the same." It is therefore competent either to a Court of Law or to a Court of Equity to give relief in

notice and cause shown. Somewhat more caution has been observed in this matter latterly, in consideration, that if such an injunction is not necessary to prevent irreparable injury, or render the purpose of the suit unavailing, it may operate injuriously to interrupt an important enterprise, and because after *subpœna* served, the respondent has notice of the suit, and proceeds at the peril of all the consequences that may ensue. *Wing v. Fairhaven*, 8 Cush. 363, 364.

cases of this description by the writ of injunction, without either Court being compelled to send this matter for decision or investigation to the other.<sup>1</sup>

These provisions must be considered in connection with the former provisions. These observations apply to those cases where injunctions are granted to protect the interests of an inventor or an author in his patents or copyrights, that is, in the works of his ingenuity or the labors of his mind.

This jurisdiction has been long established, originally upon the ground that the Law did not give a complete remedy.<sup>2</sup> In the first place, there was no power to prevent the reiterated infringement of the copyright.<sup>3</sup>

In addition to this consideration, the plaintiff could have no preventive at Law to restrain the future use of his invention or the publication of his work injuriously to his title and interest. Besides which, in most cases of this sort, the bill usually seeks an account, in one case of the books printed, and, in the other, of the profits which have arisen from the use of the invention from the persons who have pirated the same; and, where the right has been already established, or, where it is established under the direction of the Court, there this account will, in all cases, be decreed as incidental to the other relief, which may be obtained, prospectively, by a perpetual injunction.<sup>4</sup>

An injunction to restrain the infringement of a patent is not obtainable as a matter of course; the equitable title flows from the legal title. So also, with regard to copyrights. On both occasions it was formerly the practice, on opening the case, to send the party to Law to establish his right.<sup>5</sup> But, on both occasions, the practice was altered, even before the recent increased jurisdiction in Equity, and the rule adopted, that when the right of the patentee appears on the record, and the patent has been granted for some length of time, and the public has permitted the exclusive and undisputed possession of it for several years — under such circumstances the Court interposed by injunction, in the first in-

<sup>1</sup> As to injunctions against railways in certain cases, see 2 Seton Dec. (3d Eng. ed.) 928 *et seq.* In cases of ships, see 2 Seton Dec. (3d Eng. ed.) 932 *et seq.*

<sup>2</sup> *Lewis v. Fullarton*, 12 Beav. 6; *Campbell v. Scott*, 11 Sim. 31.

<sup>3</sup> 2 Story Eq. Jur. § 930 to § 936; *Orr v. Littlefield*, 1 Wood. & Minot, 13.

<sup>4</sup> Lord Red. 138; *Hogg v. Kirby*, 8 Ves. 223, 224; *The Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 705, 706; *Baily v. Taylor*, 1 R. & M. 73.

<sup>5</sup> *Dodsley v. Kinnersley*, Amb. 406.

stance, without putting the party, previously, to establish his right in an action at Law.<sup>1</sup>

In such cases, however, satisfactory evidence was demanded of exclusive possession by the patentee; and where this was wanting, the Court would not interfere without a trial at Law.<sup>2</sup> The 15 & 16 Vict. c. 83, consolidates and amends the law of patents, and by the statute jurisdiction is given to a Common Law Court upon the trial of an action to order an injunction.<sup>3</sup>

Similar principles apply to cases of copyright.<sup>4</sup> At first the

<sup>1</sup> *Bolton v. Bull*, 3 Ves. 140; *Harmer v. Plane*, 14 Ves. 133; *Hill v. Thompson*, 3 Mer. 622; and see *Kay v. Marshall*, 1 M. & C. 373; *Stevens v. Keating*, 2 Ph. 333; *Caldwell v. Vanvissingen*, 9 Hare, 415; *Newall v. Wilson*, 2 De G., Mac. & Gor. 282; *The Universities of Oxf. & Camb. v. Richardson*, 6 Sumner's Vesey, 689, note (a); 2 Story Eq. Jur. § 934, § 935; *Eden Injunct.* (2d Am. ed.) 304 to 307; *Ogle v. Ege*, 4 Wash. C. C. 534; *Isaacs v. Cooper*, ib. 259; *Rogers v. Abbott*, ib. 514; *Livingston v. Von Ingen*, 9 John. 570; *Phillips Patents*, 451, 469; *Sullivan v. Redfield*, 1 Paine C. C. 441; *Orr v. Littlefield*, 1 Wood. & Minot, 13; *Goodyear v. Day*, 2 Wallace jr. 283.

<sup>2</sup> *Collard v. Allison*, 4 M. & C. 487; *Bridson v. Benecke*, 12 Beav. 1; 2 Story Eq. Jur. § 934; *Bacon v. Jones*, 4 M. & C. 433; 2 Seton Dec. (3d Eng. ed.) 912.

<sup>3</sup> Sect. 42, and see 16 & 17 Vict. cc. 5, 115.

<sup>4</sup> The copyright of *printed books, &c.*, depends on 5 & 6 Vict. c. 45, extended by 8 & 9 Vict. c. 93; 16 & 17 Vict. c. 107; 18 & 19 Vict. c. 96, and 10 & 11 Vict. c. 95. The copyright in *prints, engravings, maps, charts and plans*, is secured by stat. 8 Geo. II. c. 13, amended by 7 Geo. III. c. 38, and 17 Geo. III. c. 57, and extended by 6 & 7 Will. IV. c. 59, and 15 & 16 Vict. c. 12; and see *Bogue v. Houlston*, 5 De G. & Sm. 267. In *models and casts of busts, &c.*, by stat. 38 Geo. III. c. 71, amended by 54 Geo. III. c. 56, and 13 & 14 Vict. c. 104, s. 6; and in *designs for articles of manufacture*, 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65, extended and amended by 13 & 14 Vict. c. 104. See, also, 14 & 15 Vict. c. 8; 15 & 16 Vict. c. 6; and see *Margetson v. Wright*, 2 De G. & Sm. 421; *M'Rae v. Holdsworth*, id. 496. *Lectures delivered orally* have also been protected from piracy by stats. 5 & 6 Will. IV. c. 65; and by the 3 & 4 Will. IV. c. 15, amended and extended to musical compositions by 5 & 6 Vict. c. 45, ss. 20, 21, and 22, the authors of *dramatic entertainments not printed, and of musical compositions*, are declared to have the property in such entertainments, and have the sole right of representing it or causing it to be represented at any place of dramatic entertainment. The copyrights of the two universities in England and the four universities in Scotland, and of the colleges of Eton, Winchester and Westminster, are confirmed and regulated by the stat. 15 Geo. III. c. 53; and by the 7 & 8 Vict. c. 12, amended and extended by 7 & 8 Vict. c. 83, and 9 & 10 Vict. c. 58, called "*The International Copyright Act*," her Majesty, in council, is empowered, under certain restrictions, to grant the privilege of copyright to the authors, inventors, and makers of books, prints, articles of sculpture and works of art first published in any foreign country, and also to authors of dramatic pieces and musical com-

Court of Chancery would not give assistance, unless the complainant had a clear legal right; but in modern times the result has been that the Court lent its aid when the legal title was either directly established by decision, or where it was apparently established by usage and possession.<sup>1</sup> There are many circumstances, however, which induced the Court to refrain from interfering before the right was ascertained and determined, for the equitable title flowed from the legal title; and, therefore, where the one was doubtful, the other did not necessarily follow. An injunction has, accordingly, been refused where the question has depended upon the effect of an agreement, for the facts may alter the effect of an agreement at Law, and that must be looked to as to the right in Equity.<sup>2</sup> An injunction has also been refused where the color of the title, by the imprudence of the real proprietor, may equally rest with other persons, as where several individuals have been permitted to publish and sell the subject of the copyright, without any interposition on the part of the proprietor, for fourteen or fifteen years; for a Court of Equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things which occasions the application:<sup>3</sup> and an injunction has also been refused where the matter which was the subject of the alleged piracy formed but a very inconsiderable part of the defendant's work, so that the damage done to the plaintiff might be calculated in a few hours;<sup>4</sup> or where the conduct of the plaintiff has been such, as in the opinion of the Court would induce the defendant to believe that the course taken by him would not be objected to.<sup>5</sup>

In all these cases the Court of Equity may now, if it think fit, try the legal right.

There must be separate bills upon each distinct invasion of a patent or copyright, unless there is a privity between the parties who have infringed or pirated either the invention or the work.<sup>6</sup>

positions. A convention under this Act, with France, has been confirmed by 15 & 16 Vict. c. 12; and see *Buxton v. James*, 5 De G. & Sm. 80; 2 Seton Dec. (3d Eng. ed.) 905 *et seq.* and notes.

<sup>1</sup> 2 Story Eq. Jur. § 935.

<sup>2</sup> *Walcot v. Walker*, 7 Ves. 1, Sumner's ed. note (a).

<sup>3</sup> *Platt v. Button*, 19 Ves. 447, Sumner's ed. note; S. C. Coop. 303; *Rundell v. Murray*, Jac. 311.

<sup>4</sup> *Baily v. Taylor*, 1 R. & M. 73; *Whittingham v. Wooler*, 2 Swanst. 428.

<sup>5</sup> *Saunders v. Smith*, 3 M. & C. 711.

<sup>6</sup> *Dilly v. Doig*, 2 Ves. jr. 486, Sumner's ed. note.

There must be also an affidavit of title, when the injunction is applied for before answer. In the case of a patent, it is incumbent on the party making the application to swear as to his belief, at the time of making it, that the invention was newly introduced into the country; for although, when he obtained his patent, he might, very honestly, have sworn as to his belief of such being the fact, yet circumstances may have subsequently intervened, or information been communicated, sufficient to convince him that it was not his own invention, and that he was under a mistake when he made his previous declaration to that effect.<sup>1</sup> In cases of copyright where the proprietor is entitled under an assignment, he is bound to show that the assignment was made to him in writing, except in cases falling within the 13th section of 5 & 6 Vict. c. 45, for it has often been determined, at Law, that a copyright cannot be assigned in any other way.<sup>2</sup> But if the plaintiff happens to be in the situation of assignee of an assignee, it will be sufficient for him to show that the assignment to himself was in writing, without tracing the title through the *mesne* assignees from the original author. Under such circumstances the Court will assume that the title is regular until the contrary is shown.<sup>3</sup> The title, however, must be a legal and not an equitable one; it must be something more than an agreement to assign, or a writing which evidences the intention of the parties; for a bill cannot be sustained unless the person who has the legal title is brought before the Court.<sup>4</sup>

It would greatly exceed the limits of our present inquiry to discuss the general rights of inventors and authors, or to state the circumstances under which an exclusive property, in virtue of these rights, may be acquired or lost;<sup>5</sup> but, in examining those

<sup>1</sup> *Hill v. Thompson*, 3 Mer. 624; *Sturz v. De la Rue*, 5 Russ. 328.

<sup>2</sup> *Power v. Walker*, 2 M. & S. 7; *Morris v. Kelly*, 1 J. & W. 481; *Moore v. Walker*, 4 Campb. 8, n.; *Latour v. Bland*, 2 Starkie, N. P. 382; and see *Stevens v. Benning*, 1 Kay & J. 168.

<sup>3</sup> *Morris v. Kelly*, 1 J. & W. 482.

<sup>4</sup> *Colburn v. Duncombe*, 9 Sim. 151.

<sup>5</sup> An injunction can be granted to restrain a publication only in cases where the publication will interfere with the plaintiff's right either of literary or other property, in the subject-matter of the publication. *Brandreth v. Lance*, 8 Paige, 24. The Court of Chancery has not jurisdiction to restrain the publication of a libel, upon a bill filed by the party whose character or business will be injured by the publication. *Ib.*

occasions in which injunctions will be granted, it is to be remembered that the Court will not interfere when the work is of a clearly irreligious, immoral, libellous, or obscene description; for a man has no claim upon this equitable protection where he has published and promulgated to the world what the Law, from motives of the highest concern, will not admit to be capable of founding a just title to as property. And not only will the Court refuse to interfere when it plainly sees that the work is obscene or immoral, but even if there be a doubt as to its evil tendency, it is not the province of a Court of Equity to decree either an injunction or an account of the profits of a work of such a nature.<sup>1</sup>

At times there is considerable difficulty in determining whether a work is pirated or not; for instance, it is allowable to make a *bonâ fide* extract, or a *bonâ fide* quotation, or a *bonâ fide* abridgment, or a *bonâ fide* use of common materials in the composition of another book.<sup>2</sup> Thus, in the case of a map or road-book, if the same skill, intelligence and diligence are applied in the second instance as there was in the first, the public would receive nearly the same information from both works; but there is no doubt the Court would interfere to prevent a mere republication of a work which the labor and skill of another person had supplied to the world. The piracy, on such occasions, is frequently detected by the identity of the inaccuracies and errors;<sup>3</sup> and it may be observed that the question, whether one author has made a piratical use of another's work, does not necessarily depend upon the quantity of that work which he has quoted or introduced into his own book.<sup>4</sup>

<sup>1</sup> *Walcot v. Walker*, 7 Ves. 1; *Southey v. Sherwood*, 2 Mer. 438; *Burnet v. Chetwood*, ib. 441.

<sup>2</sup> Short abridgments are allowed; *Bell v. Walker*, 1 Bro. C. C. 451; *Gyles v. Wilcox*, 2 Atk. 143; and see *Murray v. Bogue*, 1 Drew. 353.

<sup>3</sup> *Cary v. Faden*, 5 Ves. 24; and see *Longman v. Winchester*, 16 Ves. 269.

<sup>4</sup> *Bramwell v. Halcomb*, 3 M. & C. 736; and see *Butterworth v. Robinson*, 5 Ves. 709; *Longman v. Winchester*, 16 Ves. 269; *Matthewson v. Stockdale*, 12 Ves. 270; *Whittingham v. Wooller*, 2 Swanst. 428; *Wilkins v. Aikin*, 17 Ves. 422. To constitute piracy of an original work, it is not necessary that the whole or the larger portion of it should be taken, but it is only necessary that so much should be taken as sensibly to diminish the value of the original work, or substantially appropriate the labors of the author. *Folsom v. Marsh*, 2 Story C. C. 100.

It is piracy to collect together and reprint from Law Reports all the cases on a particular subject, though the collection and classification may be new, and with

In a case where the Court, upon the evidence read pending the motion, concluded that if the parts affected with the character of piracy were taken away, there would be left an imperfect work which could not to any useful extent serve the purpose intended by the publication, the injunction, to restrain the publication of any parts pirated from the plaintiff's work, was granted without waiting till all the parts pirated could be distinctly marked.<sup>1</sup>

And, in general, if the parts pirated are so mingled with the original portions of a work, that they cannot be separated, the Court will enjoin the publication of the whole, although a very large proportion of the work may be unquestionably original.

By analogy to the principle upon which the Court proceeds in cases of copyright, it will also interfere to restrain the publication of *manuscript treatises*, or *private letters* which bear the character of literary composition:<sup>2</sup> this was established with regard to manuscripts in Mr. Webb's and Mr. Forrester's cases, the former of whom had his *Precedents of Conveyancing* stolen out of his chambers, and the latter had his notes copied by a clerk to the gentleman to whom he had lent them;<sup>3</sup> in both instances the printing and publishing them was restrained by injunction.

With regard to letters which bear the character of literary compositions, they must be treated as within the laws protecting the rights of literary property, and a violation of those rights is affected with the same consequences as the publication of a treatise in manuscript. Upon this ground Pope's, Swift's and Lord Chesterfield's Letters have all been protected by means of an injunction;<sup>4</sup> but a question has been raised and a doubt suggested, as to how far the like protection would be given where the letters published did not fall, in strictness, within the terms of literary compositions.<sup>5</sup> It is now, however, settled that the writer of a letter has the addition of several previously unpublished decisions and notes. *Hodges v. Welsh*, 2 Irish, Eq. 266. See *Wheaton v. Peters*, 8 Peters, 591; *Cary v. Faden*, 5 Sumner's Vesey, 24, note (b), 26, Mr. Hovenden's notes; *Gray v. Russell*, 1 Story, C. C. 11.

<sup>1</sup> *Lewis v. Fullarton*, 2 Beav. 6.

<sup>2</sup> See *Brandreth v. Lance*, 8 Paige, 24; 2 Story Eq. Jur. § 943.

<sup>3</sup> *Webb v. Rose*, cited 2 Bro. P. C. 138; *Forrester v. Waller*, cited 4 Burr. 2331, and 2 Bro. P. C. 138; *Southey v. Sherwood*, 2 Mer. 434; and see *Prince Albert v. Strange*, 1 Mac. & Gor. 25.

<sup>4</sup> *Pope v. Curl*, 2 Atk. 342; *Thompson v. Stanhope*, Amb. 737.

<sup>5</sup> 2 Story Eq. Jur. § 944, § 945. An author of letters or papers of whatever kind, whether they be letters of business or private letters, or literary composi-

a joint property in it with the person to whom it is addressed ; the receiver has a special property in it ; but no more : it is a gift to him for the purpose of reading, and in some cases for the purpose of keeping it, but *ultra* the purposes for which it was sent, the property of the letter remains in the sender, which, being so, it cannot be published without the writer's consent. And it is immaterial whether the publication is made with a view to profit or not : if for profit, the party is then selling, and if not for profit, he is then giving, that, a portion of which belongs to the writer : such appears to be the result of the decisions on this subject.<sup>1</sup>

A similar jurisdiction exists in Equity to restrain, by injunction, the improper use by one man of the trade-marks or name of another person.<sup>2</sup> In cases of this kind, as the jurisdiction is exercised over legal rights upon similar principles to those which are applied in cases of copyrights, patents, and other rights of a similar description, if the legal right is disputed, the Court does not, except in a strong case, interfere in the first instance by injunction, but it puts the party upon establishing his right at Law before it confers the equitable remedy. And when it does interfere

tions, has a property and an exclusive copyright therein, unless he unequivocally dedicate them to the public, or to some private person ; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character. *Folsom v. Marsh*, 2 Story C. C. 100 ; 2 Story Eq. Jur. § 946 *et seq.*

<sup>1</sup> *Earl of Granard v. Dunkin*, 1 B. & B. 207 ; *Pope v. Curl*, 2 Atk. 342 ; *Gee v. Pritchard*, 2 Swanst. 403 ; and see *Lord and Lady Percival v. Phipps*, 2 V. & B. 19.

<sup>2</sup> See 22 Lond. Law Mag. 148 ; 23 Amer. Jur. 138 ; *Sykes v. Sykes*, 3 Barn. & Cres. 541 ; *Canham v. Jones*, 2 Ves. & Bea. 218 ; 2 Story Eq. Jur. § 951 ; 2 Seton Dec. 914 *et seq.* ; *Stewart v. Smithson*, 1 Hilton (N. Y.) 119 ; *Williams v. Johnson*, 2 Bosw. (N. Y.) 1 ; *Merrimack Manuf. Co. v. Garner*, 4 E. D. Smith (N. Y.) 387 ; *Clark v. Clark*, 25 Barb. (N. Y.) 76 ; *Lemoine v. Garston*, 2 E. D. Smith (N. Y.) 343 ; *Coffeen v. Brunton*, 5 McLean, 256 ; *Gillot v. Kettle*, 3 Duer, 624 ; *Ames v. King*, 2 Gray, 379. To warrant such an injunction the resemblance between the trade-marks must be such as would deceive the ordinary mass of purchasers. *Merrimack Manuf. Co. v. Garner*, *supra* ; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416. Where the plaintiffs were manufacturers, in England, of "Taylor's Persian Thread," and the defendant in America imitated their names, trade-marks, envelopes, and labels, and placed them on thread of a different manufacture, it was held, that it was a fraudulent infringement by the defendant of the right of the plaintiffs, for which Equity would grant relief ; whether other persons had or had not done the same. *Taylor v. Carpenter*, 3 Story C. C. 458.

by injunction at first, it never does so without giving the party restrained an opportunity of disputing the plaintiff's legal title.<sup>1</sup>

With respect to what constitutes a legal title in trade-marks, it seems clear, that any article of manufacture not protected by patent may be made and sold by any person, and that too by the name given to it by the inventor. But a man has no right to sell his own goods or manufactures, under the pretence that they are the goods or manufactures of another. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.<sup>2</sup> Hence there arises so much of a property in a name or mark, that the Court will interfere by injunction against a person using the name or marks of another, even though there be no intentional deception.<sup>3</sup>

<sup>1</sup> *Motley v. Downman*, 3 M. & C. 14.

<sup>2</sup> *Perry v. Truefit*, 6 Beav. 72; *Holloway v. Holloway*, 13 Beav. 209; *Farina v. Silverlock*, 39 Eng. Law & Eq. 514; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Taylor v. Carpenter*, 3 Story C. C. 458.

<sup>3</sup> *Nullington v. Fox*, 3 M. & C. 338. For the cases at Law upon this subject, see *Crawshay v. Thornton*, 1 Man. & Gr. 357; *Knott v. Morgan*, 2 Keen, 213; *Franks v. Weaver*, 10 Beav. 297; *Clark v. Freeman*, 11 Beav. 112; *Farina v. Silverlock*, 6 De G., Mac. & G. 214. The rights of parties in reference to trade-marks, &c. are regulated by statute in Massachusetts, which also provides for restraining by injunction the unlawful use thereof. Genl. Sts. c. 56, pp. 297, 298.

To restrain one from selling an article in his own name, on the ground that it is the name in which another has long sold a similar article, fraud must be shown. *Burgess v. Burgess*, 3 D. M. & G. 896. Such fraud being shown, the selling may be restrained. *Holloway v. Holloway*, 13 Beav. 209, 214. The Lord Chancellor would not restrain printing labels as trade-marks, which might be sold for a legitimate purpose, without proof of fraud. *Farina v. Silverlock*, 6 D. M. & G. 214; though Vice-Chancellor Wood did in S. C. 1 K. & J. 509. After the action, the injunction against printing was made perpetual, and defendant had to pay all costs at Law and in Chancery. *Farina v. Silverlock*, 4 K. & J. 650, 653, 656. Defendants were stayed issuing a circular and card leading to suppose they had succeeded to plaintiff's business on premises which they took after them. *Harper v. Pearson*, 3 L. T., N. S. 547. The Court would not restrain selling a quack medicine, under the name of plaintiff, an eminent physician. *Clark v. Freeman*, 11 Beav. 112. In *Knott v. Morgan*, 2 Keen, 213, an injunction was granted to stay defendants running omnibusses, colorably imitating others. A part owner of trade-marks can sue alone for injunction, erasure, and his share of profits. *Dent v. Turpin*, 2 J. & H. 139, 142, 147. A foreign manufacturer is entitled to an injunction and account as to trade-marks. *Collins Co. v. Brown*, *Collins Co. v. Cowen*, 3 K. & J. 423, 428; 2 Seton Dec. (3d Eng. ed.) 914 *et seq.*

In the case of *Motley v. Downman*,<sup>1</sup> a question of some nicety arose as to whether the right to the use of a mark belongs to the successors of those who manufactured the article, or to the future lessees of the property whereon it was manufactured, but the point was not decided.

With respect to these cases, it may, lastly, be observed, that the remedy given in Equity is discretionary, and will be withheld if there has been any improper conduct on the part of the plaintiff. On this principle the Court has refused to grant an injunction in the first instance, where the plaintiff has made false representations to the public concerning the article which he seeks to protect.<sup>2</sup>

Upon grounds of irreparable mischief, Courts of Equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment;<sup>3</sup> and it matters not, in such cases, whether the secrets be secrets of trade, or secrets of title, or other secrets of the party important to his interests.<sup>4</sup>

The next purpose for which injunctions may be applied, is to prevent the alienation of property where it would work an irreparable or gross injustice:<sup>5</sup> under such circumstances an injunction will be granted, and so it often has been, when the alienation contemplated was strictly legal, but other circumstances, which the Courts of Law could not take notice of, would have rendered it improper that such an alienation should be made: thus, in the case of negotiable instruments, if a bill or note affected with fraud

<sup>1</sup> *Ubi supra*.

<sup>2</sup> *Perry v. Truefit*, 6 Beav. 66; *Pidding v. How*, 8 Sim. 477.

<sup>3</sup> 2 Story Eq. Jur. § 954.

<sup>4</sup> *Cholmondeley v. Clinton*, 19 Ves. 261, 267; *Evitt v. Price*, 1 Sim. 483; *Yovatt v. Winyard*, 1 J. & W. 394. Partners may be restrained from acting as such in various cases, or from acting out of the course of the business, or against the interest of the firm. See 2 Seton Dec. (3d Eng. ed.) 917, 918; *England v. Curling*, 8 Beav. 130; *Hall v. Hall*, 12 Beav. 414, 419; 20 Beav. 139; *Marshall v. Watson*, 25 Beav. 501, 504; *Turner v. Major*, 10 W. R. 243; *Churton v. Douglas*, Joh. 174, 185, 187, 189.

<sup>5</sup> 2 Story Eq. Jur. § 953. An injunction may be granted to prevent the transfer of a specific thing, which, if transferred, would be irretrievably lost to the owner; such as negotiable securities and stocks. *Osborn v. United States Bank*, 9 Wheaton, 738; 2 Story Eq. Jur. § 906, 907; *Eden Injunct.* (2d Am. ed.) 341, 342; *Darst v. Brockway*, 11 Ohio, 462; *Atlantic De Laine Co. v. Tredick*, 5 Rhode Is. 171.

is transferred to a *bond fide* holder, without notice, the latter may be entitled to recover upon it; for the bill or note would be a good security in the hands of the person to whom it was so transferred, and therefore the person against whose rights they may be made available is entitled to protection from that danger and the mischief attending it;<sup>1</sup> accordingly, the parties will be restrained by injunction on the filing of the bill, and the application for it may be made *ex parte*, if it is supported by an affidavit verifying the truth of the fraudulent circumstances, lest the defendant should, upon intimation of the suit, defeat its object by negotiating the security.<sup>2</sup> Thus, even a *bond fide* holder of a bill of exchange which has been negotiated by means of a forgery of the name of the payee as indorsee, will be restrained from suing the acceptor upon it, and the Court will, at the hearing, direct the forged instrument to be delivered up to be cancelled.<sup>3</sup>

Upon a like principle, the Court will interfere to restrain the transfer of stock,<sup>4</sup> or the receipt of bank annuities, or the sale of specific chattels: as when the title of stock is controverted between principal and agent;<sup>5</sup> or, when the dividends have been applied by a society on erroneous principles, so as to exhaust the whole fund;<sup>6</sup> or, when it is necessary to protect the enjoyment of specific chattels.<sup>7</sup>

If a suit is actually depending in the Ecclesiastical Courts with respect to the title to stock, or with regard to the validity of a probate, or when the representation is in dispute, the Court will restrain the parties *pendente lite* from receiving or dealing with the property of the deceased.<sup>8</sup> But a distinction must here be made:

<sup>1</sup> 1 Fonbl. on Eq. c. 1, s. 8, n. (y); *Smith v. Haytwell*, Amb. 66; *Lloyd v. Gurdon*, 2 Swanst. 180; *Patrick v. Harrison*, 3 Bro. C. C. 47.

<sup>2</sup> *Smith v. Akywell*, 3 Atk. 566; *Hood v. Aston*, 1 Russ. 412; 2 Seton Dec. (3d Eng. ed.) 918, 919.

<sup>3</sup> *Esdail v. La Nauze*, 1 Y. & C. 394; *Lord Portarlington v. Soulby*, 3 M. & K. 104; *Maitland v. Backhouse*, 16 Sim. 58.

<sup>4</sup> 2 Story Eq. Jur. § 907; *Osborn v. United States Bank*, 9 Wheaton, 738; *Eden Injunct.* (2d Am. ed.) 343, 344, 345.

<sup>5</sup> *Lord Chedworth v. Edwards*, 8 Ves. 46; but see *Cox v. Paxton*, 2 Mad. Ch. Pr. 2d ed. 155.

<sup>6</sup> *Reeve v. Parkins*, 2 J. & W. 390.

<sup>7</sup> *Lady Arundell v. Phipps*, 10 Ves. 139; *Wood v. Rowcliffe*, 2 Phil. 382; 2 Seton Dec. (3d Eng. ed.) 937.

<sup>8</sup> See Story Eq. Jur. § 907; *Osborn v. United States Bank*, 9 Wheaton, 738; *Spendlove v. Spendlove*, Cam. & Norw. 86.

for if there is a contest who shall be the executor or administrator, and there is nothing to show who is to be considered as sustaining either of those characters, the interference of the Court is quite of course;<sup>1</sup> if, however, a probate or letters of administration have been previously granted, and a suit has been instituted in the Ecclesiastical Courts to dispute their validity, the Court of Chancery will not interfere, *as a matter of course*, because there has been an adjudication already: wherefore, under such circumstances, it looks into the whole case, and if it sees sufficient ground for its interposition, such as fraud, insolvency, or a *devastavit*, it grants an injunction, and also a receiver pending the litigation.<sup>2</sup>

The Court, acting upon the principles above laid down, will also grant an injunction to restrain a party from making vexatious alienations of real property, *pendente lite*;<sup>3</sup> so it will enjoin a vendor from conveying the legal title to real estate, pending a suit for the specific performance of a contract for the sale of that estate;<sup>4</sup> for, in every such case, the plaintiff may be put to the expense of making the vendee a party to the proceedings; and, at all events, his title, if he prevails in the suit, may be embarrassed by such new outstanding title under the transfer. Although the maxim of law says "*pendente lite nil innovatur*," that maxim is not to be understood as warranting the conclusion, that the conveyance so made is absolutely null and void, at all times, and for all purposes: the true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit; and they are not bound to take notice of the title acquired under it; with regard to them, the title is to be taken as if it had never existed, as otherwise suits would be interminable, if one party pending the suit could, by conveying to others, create a necessity for introducing new parties.<sup>5</sup>

<sup>1</sup> *King v. King*, 6 Ves. 172; *Watkins v. Brent*, 1 M. & C. 102; *Atkinson v. Henshaw*, 2 V. & B. 85.

<sup>2</sup> *Andrews v. Powys*, 2 Bro. P. C. 504; *Knight v. Duplessis*, 1 Ves. 324; *Ball v. Oliver*, 2 V. & B. 96; *Watkins v. Brent*, 7 Sim. 512; S. C. 1 M. & C. 97; *Marr v. Littlewood*, 2 M. & C. 454.

<sup>3</sup> *Daly v. Kelly*, 4 Dow. 440; see, however, *Turner v. Wright*, 4 Beav. 40; *Great Western Railway Company v. Birmingham and Oxford Railway Company*, 2 Phil. 597; 2 Story Eq. Jur. § 953.

<sup>4</sup> *Echloff v. Baldwin*, 16 Ves. 267; *Daly v. Kelly*, 4 Dow. 435.

<sup>5</sup> *Metcalf v. Pulvertoft*, 2 V. & B. 205; *Bishop of Winchester v. Paine*, 11

In like manner sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons ; as in cases of trusts and special authorities, where the party is abusing his trust or authority :<sup>1</sup> and where sales have been made to satisfy certain trusts and purposes, and there is danger of a misapplication of the proceeds, Courts of Equity will also restrain the purchaser from paying over the purchase-money.<sup>2</sup> So also husbands may be restrained from transferring property in fraud of the equitable rights of their wives.<sup>3</sup>

Acting upon the same principles, the Court will, where there is a dispute respecting the right of presentation to an ecclesiastical benefice, not only restrain the party having the legal right of presentation from presenting, but it will also enjoin the bishop from inducting and from taking advantage of a lapse pending the litigation, by collating to the benefice, till the decree of the Court.<sup>4</sup>

The Court has also, upon the same ground, restrained the trustees of a dissenting chapel, from appointing, as a minister of that chapel, a person not duly qualified according to the constitution of the chapel, to hold the office, although it refused that part of the motion which asked for an injunction to restrain the trustees from permitting persons not duly qualified from officiating occasionally, during the short time that might elapse before the hearing, when the facts upon both sides must be known.<sup>5</sup>

Injunctions have, in like manner, been granted to restrain indorsement of the certificate of a ship's registry,<sup>6</sup> or the sailing of a ship, upon the application of a part owner, whose share was unascertained, in order to ascertain that share, and to obtain the usual security given in the Court of Admiralty for the due return

*Ves.* 197 ; *Gaskell v. Durdin*, 2 B. & B. 169 ; *Bishop of Winchester v. Beavor*, 3 *Ves.* 314 ; *Moore v. M'Namara*, 2 B. & B. 186 ; and see ante.

<sup>1</sup> *Anon.* 6 *Mad.* 10.

<sup>2</sup> *Green v. Lowes*, 3 *Bro. C. C.* 217 ; *Matthews v. Jones*, 2 *Anst.* 506 ; *Hawkshaw v. Parkins*, 2 *Swanst.* 549.

<sup>3</sup> *Anon.* 9 *Mod.* 43 ; *Eden on Injunct.* ch. 14, pp. 295, 296 ; *Roberts v. Roberts*, 2 *Cox*, 422 ; *Flight v. Cook*, 2 *Ves.* 619 ; 1 *Eq. Ca. Ab.* 360, pl. 4 ; *Cadogan v. Kennett*, *Cowp.* 436.

<sup>4</sup> *Nicholson v. Knapp*, 9 *Sim.* 326.

<sup>5</sup> *Miligan v. Mitchell*, 1 *M. & K.* 446.

<sup>6</sup> *Thompson v. Smith*, 1 *Mad.* 395.

of the ship.<sup>1</sup> So they will be granted against the removal of timber wrongfully cut down.<sup>2</sup>

Injunctions will also be granted to compel the due observance of personal covenants, where there is no effectual remedy at Law :<sup>3</sup> thus, in the old case of the parish bell, where certain persons owning a house in the neighborhood of a church, entered into an agreement to erect a cupola and clock, in consideration that the bell should not be rung at five o'clock in the morning to their disturbance ; the agreement being violated, an injunction was afterwards granted to prevent the bell being rung at that hour.<sup>4</sup> Upon the same ground, a celebrated play-writer, who had covenanted not to write any dramatic performances for another theatre, was, by the injunction, restrained from violating the covenant.<sup>5</sup> So an author who had sold his copyright in a work, and covenanted

<sup>1</sup> *Haly v. Goodsan*, 2 Mer. 77 ; *Christie v. Craig*, ib. 137 ; *Abbott on Shipp.* pt. 1, c. 3, ss. 4, 5. The Court refused to restrain the sailing of a ship on the application of a part owner, where the ship was intended to sail on the next day, and it did not appear, by the affidavit, that there was any circumstance to account for the plaintiff's delay in applying. *Christie v. Craig*, 2 Mer. 137. The Court also refused to stop the sailing of a ship on the ground that it contained goods which belonged to the plaintiff, but which he had sold to a party who had become insolvent, but over which he had retained a right of stoppage *in transitu*. *Goodhart v. Lowe*, 2 J. & W. 349.

<sup>2</sup> *Anon.* 1 Ves. jr. 93.

<sup>3</sup> As to injunctions in reference to agreements, see 2 Seton Dec. (3d Eng. ed.) 921 *et seq.* As to the jurisdiction in Equity to enjoin the collection of the purchase-money of an estate, where the title fails, or is in controversy, &c., see *Rawle Cov. for Title* (3d ed.) 676 *et seq.* ; *Bumpus v. Platner*, 1 John. Ch. 213 ; *Abbot v. Allen*, 2 John. Ch. 519 ; *Johnson v. Gere*, 2 John. Ch. 546 ; *Miller v. Avery*, 2 Barb. Ch. 594 ; *Platt v. Gilchrist*, 3 Sandf. S. C. 118 ; *Shannon v. Marselis*, Saxton (N. J.) 413 ; *Jaques v. Esler*, 3 Green Ch. (N. J.) 462 ; *Morrison v. Beckwith*, 4 Monroe (Ken.) 73. Where a purchaser would be entitled, at law, to defend himself from payment of the purchase-money, either wholly or partially, and has had no opportunity for doing so, a Court of Equity will not hesitate to grant relief, by enjoining the collection of the purchase-money, either temporarily or permanently, or by other proceedings suited to the circumstances of the case. *Rawle Cov. for Title* (3d ed.) 686 *et seq.*

<sup>4</sup> *Martin v. Nutkin*, 2 P. Wms. 266. Where a block of buildings has been erected, with particular covenants respecting the enjoyment thereof, each purchaser or owner will be entitled to an injunction to prevent a breach of the covenants, as by the erection of livery-stables, slaughter-houses, glue-factories, &c. *Barrow v. Richards*, 8 Paige, 351 ; *Williams v. Jersey*, 1 Craig & Phil. 91. See *Parker v. Nightingale*, 6 Allen, 341.

<sup>5</sup> *Morris v. Colman*, 18 Ves. 437 ; *Clarke v. Price*, 2 Wils. 157 ; *Stocker v. Brockelbank*, 3 Mac. & Gor. 266.

not to publish any other to its prejudice, was restrained by injunction from so doing.<sup>1</sup>

Upon the same ground, in *Rankin v. Huskisson*,<sup>2</sup> an injunction was granted to restrain the Commissioners of Woods and Forests from building on the site of Carlton Gardens, in violation of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site.<sup>3</sup>

Injunctions have also been granted to restrain a party who has sold the good-will of his trade, and covenanted not to exercise the same trade within certain limits, from exercising such trade within the prescribed limits: thus, where a coach-master having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from Reading to London, or prejudicial to the business which he had sold, set up a coach to run from Pangborne to London, through Reading, he was restrained from running the coach from Reading to London and *vice versa*.<sup>4</sup>

Upon the same principle, where bankers had sanctioned an arrangement entered into by certain persons, copartners, who were indebted to them, but afterwards attempted, by means of the debt,

<sup>1</sup> *Barfield v. Nicholson*, 2 S. & S. 1; *Colburn v. Simms*, 2 Hare, 543; *Lumley v. Wagner*, 1 De Gex, Mac. & Gor. 604.

<sup>2</sup> 4 Sim. 13; *Patching v. Dubbins*, 1 Kay, 1; *Coles v. Sims*, id. 56.

<sup>3</sup> In Massachusetts, it has been held, that a lessor is not entitled, during the continuance of the lease, to an injunction to restrain the lessee from obstructing and darkening windows in the demised tenement, unless the injury will probably be irreparable, or cannot be compensated by damages recoverable in a suit at law. *Atkins v. Chilson*, 7 Metcalf, 398. The Court in that case remark, "No doubt an injunction will lie, to restrain the lessee from violating his covenant, in a proper case, and when it is necessary to prevent irreparable mischief." Page 404.

A restriction of the manner of using land granted, not against public policy, and beneficial to adjacent land of the grantor, whether inserted by way of condition or covenant, or otherwise, may be enforced in Equity against the grantee, or his assigns with notice. *Whitney v. Union Railway Co.* 11 Gray, 359. See *Parker v. Nightingale*, 6 Allen, 341.

<sup>4</sup> *Williams v. Williams*, 2 Swanst. 253. Although it has been long settled that covenants restraining the exercise of a trade in a *particular place*, as contradistinguished from covenants in general restraint of trade, are valid, and that Courts of Equity will compel the specific performance, and enjoin against the violation of such covenants; yet it has also been held, that the mere sale of the good-will of trade imposes no obligation on the vendor to forbear the exercise of the same trade, and that Courts of Equity will not execute a contract for the sale of a good-will, *ibid.* n. (a), and see the cases there cited. *Smith v. Mules*, 9 Hare, 556; *Simpson v. Chapman*, 4 De G., Mac. & Gor. 154.

to make the retiring partner a bankrupt, by proceeding under the 1 & 2 Vict. c. 110, s. 8 ;<sup>1</sup> they were restrained from so doing by injunction.

Injunctions have also been, frequently, granted to restrain lessees, who had covenanted to keep the banks of rivers or ponds in repair, from destroying or impairing them,<sup>2</sup> or an outgoing tenant from removing dung or crops, contrary to express covenants contained in his lease ;<sup>3</sup> or, where the violation of the covenant was not provided for by liquidated damages, to restrain the ploughing up of meadow, &c.<sup>4</sup>

In one of the earliest cases upon this subject, an injunction was granted till the hearing, by the House of Lords, upon appeal, to restrain a lessee from digging sand, gravel, &c., in violation of a covenant secured by a penalty ;<sup>5</sup> and in a case shortly afterwards before Lord Hardwicke, an injunction was granted, expressly for the purpose of restraining a breach of covenant, by a tenant, who was converting houses to a different use from that prescribed by his lease.<sup>6</sup>

Though a lessee is required by law, to cultivate the lands demised to him in a husbandmanlike manner, conformable to the custom of the country,<sup>7</sup> yet this is usually defined by some express covenant. It has, upon this subject, been determined at Law, that a covenant to occupy in a good and husbandmanlike manner, according to the custom of the country, will be broken by contravening the prevalent course of husbandry in the neighborhood ; and that, even if the contract be simply to occupy the estate in a good and hus-

<sup>1</sup> *Attwood v. Banks*, 2 Beav. 192.

<sup>2</sup> *Eden on Injunct.* 198 ; *Lord Bathurst v. Burden*, 2 Bro. C. C. 64, (Perkins's ed. notes) ; *Lord Kilmorey v. Thackeray*, cited *ibid.*

<sup>3</sup> *Johnson v. Goldswaine*, 3 Anst. 749 ; *Geast v. Lord Belfast*, *ib. n.* ; *Pulteney v. Shelton*, 5 Ves. 147, Sumner's ed., Mr. Hovenden's notes, 260, 261, note (a), and errata, *ib.* ; *Lord Grey de Wilton v. Saxon*, 6 Ves. 106, Sumner's ed. note (a). The case of *Lathropp v. Marsh*, 5 Ves. 259, is stated to be clearly wrong, as there were not only breaches of covenant, but also distinct acts of waste committed and threatened. *Eden on Injunct.* 198 ; *Fleming v. Snook*, 15 Beav. 250.

<sup>4</sup> *Aylet v. Dodd*, 2 Atk. 238 ; *Woodward v. Gyles*, 2 Vern. 119 ; *Rolfe v. Peterson*, 2 Bro. P. C. (ed. Tomlins,) 436.

<sup>5</sup> *City of London v. Pugh*, 4 Bro. P. C. (ed. Tomlins,) 395 ; *Eden*, 199.

<sup>6</sup> *Worden v. Ellers*, 18th December, 1739. There is a very full account of Lord Hardwicke's judgment, 6 Sergt. Hill's MSS. 2 and 12, *ib.* 76 ; *Eden*, 199.

<sup>7</sup> *Powley v. Walker*, 5 T. R. 373 ; *Eden*, 199.

bandmanlike manner, this will throw a liability upon the tenant to cultivate the land according to the practice of the neighborhood;<sup>1</sup> and even, though a farm be held under a written agreement, the custom of the neighborhood may well be insisted upon, provided it be not either expressly or by implication excluded by the terms of the agreement.<sup>2</sup> The same principle has been acted upon in Equity, where an injunction has been granted to restrain a tenant from year to year, (who, it was said, was equally bound as a tenant for a longer period to manage his farm in a husbandmanlike manner,) from removing crops, manure, &c., contrary to the custom of the country.<sup>3</sup> In a previous case a tenant was restrained from ploughing up pasture-land, although the lease did not contain an express covenant not to convert pasture into arable;<sup>4</sup> but the landlord was holden entitled to the injunction, on the ground of there being a covenant to manage pasture in a husbandmanlike manner.<sup>5</sup> Upon the same principle, the Court has interfered to restrain a tenant from sowing mustard, saffron, woad, and other deleterious crops, as being contrary to the course of husbandry.<sup>6</sup>

A distinction has been made, as to enforcing, by injunction, the specific performance of *express covenants* and of *implied agreements*; and the Court has refused to interfere to restrain a tenant, who was holding over from removing articles contrary to the custom of the country, as the Court would not imply special covenants, as to cultivation, from the mere act of holding over.<sup>7</sup>

A covenant to repair, and, at the end of the term, to surrender buildings in good condition, does not preclude an injunction against pulling them down and carrying away the materials just before the end of the term.<sup>8</sup>

Where there is a covenant not to convert premises into a shop, or to carry on a trade without a license in writing; the permission of the lessor, without writing, to carry on one trade will not

<sup>1</sup> Legh v. Hewitt, 4 East, 154.

<sup>2</sup> Wigglesworth v. Dallison, Doug. 201; Senior v. Armitage, 1 Holt, N. P. C. 197; Webb v. Plummer, 2 B. & A. 746; Eden, 199.

<sup>3</sup> Onslow v. —, 16 Ves. 173.

<sup>4</sup> See Atkins v. Chilson, 7 Metcalf, 404.

<sup>5</sup> Drury v. Moilins, 6 Ves. 328.

<sup>6</sup> Pratt v. Brett, 2 Mad. 62; Eden, 200.

<sup>7</sup> Kimpton v. Eve, 2 V. & B. 349; Eden, 200.

<sup>8</sup> Mayor, &c., of London v. Hedger, 18 Ves. 355; Eden on Injunct. 260.

amount to a general license for any trade, so as to preclude the lessor from his right to an injunction.<sup>1</sup>

It may be observed here, that, as the Court will, by its injunction, compel the performance of a covenant or agreement, so, on the other hand, it will relieve a party against the consequences of the non-performance of it, where such consequences involve either a forfeiture or the imposition of a penalty.<sup>2</sup>

The doctrine upon the subject of relief from penalties has thus been stated by Lord Thurlow: — “Where a penalty has been inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty is only accessional, and to secure the damage really incurred.”<sup>3</sup> But where the parties, instead of securing the performance of the agreement by a penalty, have fixed upon a certain sum by way of liquidated damages, to be paid in the event of the non-performance of the agreement, a Court of Equity (except in certain cases of waste), refuses to interfere in restraining the recovery of such damages.<sup>4</sup>

Upon these principles it is that Courts of Equity interpose to restrain proceedings at Law for the recovery of penalties.<sup>5</sup>

A common instance of this species of relief is that which is given against a clause of re-entry for non-payment of rent.<sup>6</sup> This

<sup>1</sup> *Macher v. Foundling Hospital*, 1 V. & B. 183; *Eden on Injunct.* 201.

<sup>2</sup> *Eden Injunct.* (2d Am. ed.) 41, 42, and notes. There seems to be a distinction taken, in Equity, between penalties and forfeitures. In the former, relief is always given, if compensation can be made; for it is deemed a mere security. In the latter, although compensation can be made, relief is not always given. 2 *Story Eq. Jur.* § 1320, § 1321, § 1322, § 1323, and notes.

<sup>3</sup> *Sloman v. Walter*, 1 Bro. C. C. (Perkins's ed., notes,) 419; *Sainter v. Ferguson*, 1 Mac. & Gor. 287.

<sup>4</sup> See *Eden Injunct.* (2d Am. ed.) 41, 42; *Skinner v. Dayton*, 2 John. Ch. 535; *S. C.* 17 John. 357; *Livingston v. Tompkins*, 4 John. Ch. 425; *Walker v. Wheeler*, 2 Conn. R. 299; 2 *Story Eq. Jur.* § 1318.

<sup>5</sup> For cases on this subject, see *Sparks v. Liverpool Waterworks Company*, 18 Ves. 428; *Rawstone v. Bentley*, 4 Bro. C. C. 415, (Perkins's ed. notes); *O'Neil v. Jones*, 1 Ridg. 170; *Kane v. Hamilton*, ib. 180; *Bateman v. Murray*, ib. 187; *Jackson v. Saunders*, 1 Sch. & Lef. 443; 2 Dow, 437; *Lennon v. Napper*, 2 Sch. & Lef. 682; *Magrane v. Archbold*, 1 Dow, 109; *Earl of Mountnorris v. White*, 2 ib. 459; *Keating v. Sparrow*, 1 B. & B. 367; *Jessop v. King*, 2 ib. 81; *Barrett v. Pearson*, ib. 189; *Eden on Injunct.* 23; *Allen v. Hilton*, 1 Fonb. 432, 5th ed.; *Bayley v. Corporation of Leominster*, 3 Bro. C. C. 529; *Baynham v. Guy's Hospital*, 3 Ves. 295; *Eaton v. Lyon*, ib. 690; *City of London v. Mitford*, 14 Ves. 41; *Saunders v. Pope*, 12 Sumner's Vesey, 282, note (a), and cases cited.

<sup>6</sup> *Eden Injunct.* (2d Am. ed.) 43 to 45 and note.

has been a ground of equitable interference from the earliest times, and there has been a Parliamentary recognition of the doctrine by the Stat. 4 Geo. II. c. 28, ss. 2, 3, which, limiting the time within which such relief is to be given to six months, permits the tenant to pay into Court, at any time before the trial of an ejectment, the arrears of rent and costs, and provides that all further proceedings shall thereupon cease.<sup>1</sup>

This relief is granted upon the principle that compensation is made to the landlord by the payment of the rent with interest; a doctrine contradicted by general experience, and often found fault with as imperfect and unjust.<sup>2</sup>

But where it is clear that the covenant is of such a nature that a Court of Equity cannot make a compensation for the breach of it, as in the case of covenants *not to assign without license*,<sup>3</sup> or to *keep the premises insured*,<sup>4</sup> relief will not be given against the penalty. Considerable discussion, also, has taken place how far the Court would relieve against a forfeiture incurred by the breach of a covenant *to repair*. In the case of *Sanders v. Pope*,<sup>5</sup> Lord Erskine, upon the authority of a determination of Lord Macclesfield,<sup>6</sup> expressed a strong opinion in favor of the equitable jurisdiction; but the doctrine, after full and elaborate discussion, has been established to the contrary.<sup>7</sup> The same determination would, consequently, be made with respect to the breach of a covenant *to build*, though the authorities are conflicting as to the power to decree a specific performance in such case.<sup>8</sup>

<sup>1</sup> Eden on Injunct. 23.

<sup>2</sup> *Hill v. Barclay*, 16 Ves. 405; S. C. 18 Ves. 61; *Bracebridge v. Buckley*, 2 Pri. 216; *Reynolds v. Pitt*, 19 Ves. 140. See 2 Story Eq. Jur. (3d ed.) § 1315, in note (2), § 1316 and notes.

<sup>3</sup> *Wafer v. Mocato*, 9 Mod. 112.

<sup>4</sup> *Rolfe v. Harris*, 2 Pri. 206, n.; *Reynolds v. Pitt*, ib. 212; S. C. 19 Ves. 134; *White v. Warner*, 2 Mer. 459.

<sup>5</sup> 12 Ves. 282.

<sup>6</sup> *Hack v. Leonard*, 9 Mod. 91.

<sup>7</sup> *Hill v. Barclay*, 16 Ves. 402; S. C. 18 Ves. 56; *Bracebridge v. Buckley*, 2 Pri. 200; but see *Hannam v. South London Waterworks Company*, 2 Mer. 67.

<sup>8</sup> There are two instances of specific performance decreed of covenants to rebuild; *City of London v. Nash*, 3, 515; 1 Ves. 120; *Allen v. Harding*, 2 Eq. Ca. Ab. 17; and in *Moseley v. Virgin*, 3 Ves. 184, Lord Rosslyn stated that a specific performance might be decreed. Lords Thurlow and Kenyon, on the other hand, have pronounced a contrary opinion. *Errington v. Aynesley*, 2 Bro. C. C. 343, (Perkins's ed. notes); *Lucas v. Comerford*, 3 Bro. C. C. 166, (Perkins's ed. notes and cases cited); S. C. 1 Ves. jr. 235. See, however, *Moor v. Greg*, 2 Phil. 717.

Injunctions may also be issued for the protection of a ward of Court from removal, marriage, or improper influence;<sup>1</sup> and, likewise, in cases of interpleader:<sup>2</sup> but as the principle upon which the Court proceeds, in cases of this description, does not come within the scope of this work, they will not be further alluded to.

Courts of Equity will likewise prevent a person from setting up an unconscientious advantage at Law, so as to interpose impediments to just rights of the other party.<sup>3</sup> Thus, if an ejectment is brought to try a right to land, the Court of Chancery will restrain the party in possession from setting up a term of years or other interest in a trustee, lessee or mortgagee, which may hinder the fair trial of the right;<sup>4</sup> but this will not be done in every case, for, as the Court proceeds upon the principle that the party in possession ought not, in conscience, to use an accidental advantage, if there is any circumstance which meets the reasoning upon this principle, the Court will not interfere; therefore, if the possessor is a purchaser for valuable consideration, without notice of the title or the claimant, this is a title, in conscience, equal to that of the claimant, and the Court will not restrain the possessor from using any advantage he may be able to gain to defend his possession.<sup>5</sup>

Where an injunction is sought to prevent the setting-up of outstanding terms, it can only be obtained (except with consent) by a decree at the hearing; for, until the decree, the Court must suppose the parties to be litigating upon questionable rights: the injunction cannot be applied for by a previous motion, for it might afterwards appear, when the case is heard, that there are circumstances which would entitle the defendant, as well as the plaintiff, to equitable assistance at the trial; and, therefore, to grant such

That a covenant to repair cannot be specifically performed, see *Rayner v. Stone*, 2 Eden, 128; *Flint v. Brandon*, 8 Ves. 159, (Sumner's ed. 164, notes); *Eden Injunct.* 27, (2d Am. ed. 46 to 48, and notes).

<sup>1</sup> *Pearce v. Crutchfield*, 14 Vea. 206.

<sup>2</sup> *Eden Injunct.* (2d Am. ed.) 393 *et seq.*; 2 Seton Dec. (3d Eng. ed.) 962.

<sup>3</sup> 2 Story Eq. Jur. § 908; *Eden Injunct.* (2d Am. ed.) 406 *et seq.*

<sup>4</sup> Lord Red. 134, 135; *Bond v. Hopkins*, 1 Sch. & Lef. 430; *Pulteney v. Warren*, 6 Vea. 89; *Crow v. Tyrrell*, 3 Mad. 181; *Leigh v. Leigh*, 1 Sim. 349.

<sup>5</sup> *Jerrard v. Saunders*, 2 Ves. jr. 457, 458; *Maundrell v. Maundrell*, 7 Vea. 567; S. C. 10 Vea. 246; *Baker v. Mellish*, *ib.* 549.

relief upon motion would be to decide the whole equity of the case before it was ripe for decision.<sup>1</sup>

Lastly, it is to be noticed, that, where repeated attempts are made to litigate the same question, which the Courts of ordinary jurisdiction will, in many cases, admit, the Court of Chancery will put an end to the oppression which may be occasioned by the abuse of this privilege. Thus, as a judgment in ejectment is not final or conclusive, but the same proceedings may be repeated forever, a perpetual injunction will be granted, to prevent the repetition of them, when the assertion of such right becomes oppressive to the opposite party.<sup>2</sup> It is on this ground that Courts of Equity have interfered, by bills of peace; but as the writ is not issued in such cases, unless upon decree, they do not come within the province of the present section.<sup>3</sup>

<sup>1</sup> *Hylton v. Morgan*, 6 Ves. 293; *Byrne v. Byrne*, 2 Sch. & Lef. 537; *Barney v. Lockett*, 1 S. & S. 419; *Northey v. Pearce*, ib. 420.

<sup>2</sup> *Lord Bath v. Sherwin*, Prec. in Ch. 261; S. C. 4 Bro. P. C. 373; *Leighton v. Leighton*, 1 P. Wms. 671; S. C. 4 Bro. P. C. 378; *Devonshire v. Newenham*, 2 Sch. & Lef. 211.

<sup>3</sup> See *Morris Canal &c. Co. v. Jersey City*, 1 Beasley (N. J.) 227. In Massachusetts, injunctions may be issued to restrain towns from raising by taxation or pledge of its credit, or paying from its treasury, any money, which they have voted to raise or pay, for a purpose other than those for which towns have the legal right and power to raise or pay money. Genl. Sts. c. 18, § 79. See *Tash v. Adams*, 10 Cush. 252; *Babbitt v. Savoy*, 3 Cush. 530; *Hood v. Lynn*, 1 Allen, 103; provided due diligence is used in making application for such injunctions. *Tash v. Adams*, *supra*; *Fuller v. Melrose*, 1 Allen, 166; *Clafin v. Hopkinton*, 4 Gray, 502; *Frost v. Belmont*, 6 Allen 152. So in New York, towns may be enjoined from expending money raised by taxation for illegal purposes. *De Baun v. New York*, 16 Barb. 392. See *Foster v. Coleman*, 10 Calif. 278; *Wilson v. Mayor of New York*, 4 E. D. Smith (N. Y.) 675. But an injunction will not be granted to prevent the collection of taxes, because of irregularities in the assessment. *Chicago &c. R. R. Co. v. Frary*, 22 Ill. 34; *Dodd v. City of Hartford*, 25 Conn. 232; *Greene v. Mumford*, *Simmons v. Same*, 5 Rhode Isl. 472; *Mills v. Gleason*, 11 Wis. 470.

Incorporated companies and the directors thereof may be restrained by injunction from committing a breach of trust by diverting or misapplying the funds or credit of the company, or doing other acts in clear excess of chartered powers; and a shareholder may file a bill for this purpose in behalf of himself and other stockholders. *Angell v. Ames, Corp.* (6th ed.) § 391 *et seq.*, § 312; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Coleman v. Eastern Co. Railway*, 10 Beav. 1; *March v. Eastern R. R. Co.* 40 N. Hamp. 567; *Robinson v. Smith*, 3 Paige, 233; *Bayless v. Orne*, 1 Freeman Ch. 173; *Bagshaw v. Eastern Coun. Railway Co.* 7 Hare, 114; *Hodges v. New England Screw Co.* 1 Rhode Isl. 312; *Hersey v. Veazie*, 11 Shepley (Me.)

It is to be observed, that the Court will not, by injunction granted upon an interlocutory application, direct the defendant to *perform* an act;<sup>1</sup> but might, upon motion, order the defendant to pull down a building which was clearly a nuisance to the plaintiff; and there is an early case in *Tothill*, of an order to show cause why a defendant who had ploughed up ancient pasture-land should not lay it down again in grass.<sup>2</sup> The contrary doctrine is, however, now established.<sup>3</sup>

In the case of *Hooper v. Brodrick*,<sup>4</sup> an injunction was granted, *ex parte*, restraining the defendant from discontinuing to use certain premises as an inn; but was dissolved upon the ground that there is no jurisdiction to restrain a person from not keeping an inn, which is the same in effect as ordering him to keep one.

But though the Court will not, directly and in terms, compel the performance of an act upon motion, yet there are many cases in which the effect may be indirectly obtained by an order merely restrictive. Thus, in the case of *Robinson v. Lord Byron*, the effect was obtained by an injunction restraining the defendant from preventing the water from flowing in such regular quantities as it had ordinarily done before the day on which the alleged nuisance commenced.<sup>5</sup> In *Lane v. Newdigate*,<sup>6</sup> a similar effect was obtained by restraining the defendant from impeding the plaintiff from navigating, using and enjoying, by continuing to keep the canals, banks or works out of repair, by diverting the

12, 13; *Cunliffe v. Manchester & Bolton Canal Co.* 1 My. & R. 131, note; *Manderson v. Commercial Bank*, 28 Penn. 379; *Balt. & Ohio R. R. Co. v. Wheeling*, 9 Grattan, 40; *Allen v. Curtis*, 26 Conn. 456; *Schley v. Dixon*, 24 Georgia, 273; *Kean v. Johnson*, 1 Stockt. (N. J.) 401; *Binney's Case*, 3 Bland, 142; *Revere v. Boston Cotton Co.*, 15 Pick. 351; *Brown v. Vandyke*, 4 Halst. Ch. (N. J.) 795; *Durfee v. Old Colony &c. R. R. Co.* 5 Allen, 230; *Kean v. Johnson*, 1 Stockt. (N. J.) 401.

<sup>1</sup> See *Carlisle v. Stevenson*, 3 Maryland Ch. Dec. 499; *Thomas v. Hawkins*, 20 Georgia, 126; *G. W. Ry v. Birmingham*, 2 Ph. 597; 2 Seton Dec. (3d Eng. ed.) 874, 936, 937.

<sup>2</sup> *Rolls v. Miller*, Toth. 144.

<sup>3</sup> *Ryder v. Bentham*, 1 Ves. 543; *Anon.* 1 Ves. jr. 140; *Lane v. Newdigate*, 10 Ves. 192; and see *Blackmore v. The Glamorganshire Canal Company*, 1 M. & K. 154.

<sup>4</sup> 11 Sim. 47.

<sup>5</sup> 1 Bro. C. C. 588, (Perkins's ed. notes.)

<sup>6</sup> 10 Ves. 192, (Sumner's ed. note (a) and cases cited); and see *Lumley v. Wagner*, 1 De Gex, Mac. & Gor. 604, where the cases are examined.

water or preventing it by the use of locks from remaining in the canals, or by continuing the removal of a stop-gate.<sup>1</sup>

With respect to the evidence upon which an injunction is granted, it has now been expressly enacted, by the 15 & 16 Vict. c. 86, s. 59, "That on motions or petitions for injunction or receiver, or to dissolve an injunction, or discharge an order for a receiver, the defendant's answer is to be regarded as an affidavit."

Before this section was enacted, the answer of the defendant was taken to be true, and affidavits, except in very special cases, could not be read against it.<sup>2</sup> The whole course for and against

<sup>1</sup> As to mandatory injunctions, see 2 Seton Dec. (3d Eng. ed.) 936.

<sup>2</sup> In *Poor v. Carleton*, 3 Sumner, 83, Mr. Justice Story remarks: "The practice in America has, I believe, become more liberal than it is in England; and if it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived that, without it, irreparable mischiefs would arise. In the present case, there are circumstances which might free me from the necessity of asserting so broad a doctrine. But I wish rather to dispose of the case upon the general ground, that the granting and dissolving injunctions in cases of irreparable mischief, rest in the sound discretion of the Court, whether applied for before or after answer; and that affidavits may after answer be read by the plaintiff to support the injunction, as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer." It is now quite settled, and has long been settled, that affidavits may be read against the answer in cases of waste, nuisance, &c., to prove acts of waste, &c. See *Robinson v. Lord Byron*, 1 Bro. C. C. (Perkins's ed.) 589, note (3); *Merwin v. Smith*, 1 Green Ch. 182; *Wing v. Fairhaven*, 8 Cush. 363. See, also, *Isaac v. Humpage*, 1 Sumner's Vesey, 427 and note (a); *Hanson v. Gardiner*, 7 Sumner's Vesey, 305 b, note (a); *Eden Injunct.* (2d Am. ed.) 384; *Morphett v. Jones*, 19 Vesey, 350; *Sackett v. Hill*, 2 Mich. (Gibbs,) 182; *Bouldin v. Baltimore*, 15 Maryland, 18; *Swindall v. Bradley*, 3 Jones Eq. (N. C.) 353; *Baker v. Taylor*, 2 Blatch. C. C. 82; *Rogers v. Danforth*, 1 Stockt. (N. J.) 289. The policy of preventing irreparable mischief has introduced this exception to the rule respecting reading affidavits in opposition to the answer, in cases of waste, or of mischief analogous to waste, but this exception does not extend to questions of title. 1 Smith Ch. Pr. (2d Am. ed.) 596, 600, 601, notes; *Eden on Injunct.* (2d Am. ed.) 136, 137, 383, 384; *Eastburn v. Kirk*, 1 John. Ch. 444. See the doubt as to this point respecting the question of title. *Poor v. Carleton*, 3 Sumner, 80, 81. It has been held that, on an application for an injunction the plaintiff may read affidavits filed before the coming in of the answer, in support of the bill, or in contradiction to the answer, but no affidavits filed subsequently to the coming in of the answer can be read. So held in *Kinsler v. Clark*, 2 Hill Ch. 620. See *Brundred v. Paterson Machine Co.* 3 Green Ch. 294. But affidavits might be added to the case made by the bill, after answer, as to collateral matters. *Shaw v. Wier*, 1 Irish Eq. 213.

In New Jersey, on an application for dissolution of an injunction, when new

the injunction is therefore now determined upon affidavit, or what is equivalent thereto, the answer of the defendant.<sup>1</sup>

An affidavit in support of an application for a special injunction is usually sworn by the plaintiffs, or some of them, but may be sworn by any person acquainted with the facts ;<sup>2</sup> thus, an injunction matter is contained in the answer, not responsive to the bill, which is relied upon as a ground for setting aside the injunction, the plaintiff may read affidavits in contradiction of such new matter. *Merwin v. Smith*, 1 Green Ch. 182. See *Morris Canal &c. Co. v. Jersey City*, 1 Beasley (N. J.) 227 ; *Green v. Pallas*, ib. 267 ; *Wooten v. Smith*, 27 Georgia, 216. The allegations of the bill, not met and denied by the answer, are to be taken as true on such an application, and if the answer does not fully meet the case disclosed by the bill, the injunction will be sustained, ib. ; *Hardy v. Summers*, 10 Gill & John. 317.

When the answer admits the equity of an injunction bill, but sets up an avoidance of it, the injunction will be continued until the hearing. *M'Namara v. Irwin*, 2 Dev. & Bat. 19 ; *Minturn v. Seymour*, 4 John. Ch. 497 ; *Lindsay v. Ethridge*, 1 Dev. & Bat. 38 ; *Rich v. Thomas*, 4 Jones Eq. (N. C.) 71 ; *Cornelius v. Post*, 1 Stockt. (N. J.) 196. And on a motion to dissolve, the facts disclosed in the answer, are alone to be regarded, not the opinions of the defendants. *Chase v. Manhardt*, 1 Bland, 335.

If the plaintiff waives an answer on oath and relies upon the affidavits of third persons annexed to the bill, to sustain an injunction, in opposition to the defendant's answer on oath denying the equity of the bill, the defendant, on an application to dissolve the injunction, may also read the affidavits of third persons in support of his answer. *Haight v. Case*, 4 Paige, 525 ; *Brown v. Haff*, 5 Paige, 235. See *Village of Seneca Falls v. Matthews*, 9 Paige, 504. But where a preliminary injunction was granted absolutely, in the first instance, and the defendant applied to have it dissolved on the ground that the whole equity of the bill was denied by the answer, he was not allowed to read affidavits in support of his answer, except where the answer itself was not conclusive, under the last clause of the 37th Rule in Chancery, New York. *Village of Seneca Falls v. Matthews*, 9 Paige, 504. In *Eastburn v. Kirk*, 1 John. Ch. 444, it was held, that the admission of *ex parte* affidavits is an exception to the general rule, and is allowable only in cases of waste, or in cases where irreparable mischief might ensue. See also to the same effect, *Hoffman v. Livingston*, 1 John. Ch. 211 ; *Roberts v. Anderson*, 2 John. Ch. 204 ; *Leroy v. Dickinson*, 1 Car. Law Repos. 497 ; *Merwin v. Smith*, 1 Green Ch. 182 ; *Bellona Co.'s Case*, 3 Bland, 442 ; *Moore v. Reed*, 1 Ired. Eq. 418 ; *Swindall v. Bradley*, 3 Jones Eq. (N. C.) 358. In *Benton v. Gibson*, 2 Hayw. 136, affidavits were allowed to be read in support of a bill for an injunction against the answer, and the injunction continued.

<sup>1</sup> 2 Seton Dec. (3d Eng. ed.) 870, 871. A party moving to dissolve an injunction need not wait to file his answer in Court, or at the rules, but he may put in his answer and have the benefit of it, at the hearing of the motion. *Goddin v. Vaughn*, 14 Grattan (Va.) 102.

<sup>2</sup> 1 Smith, 595. See *Campbell v. Morrison*, 7 Paige, 157 ; *Bank of Orleans v. Skinner*, 9 Paige, 305.

tion was granted to restrain the publication of a work sold as the plaintiff's, upon affidavit by the plaintiff's agent, the plaintiff himself being abroad.<sup>1</sup>

The affidavit must also be sworn *after* the bill is filed, otherwise it cannot be read, not having been made in a cause; and it seems that the office copy of the affidavit ought to be in Court at the time when the injunction is moved for; an injunction has been discharged on the ground that the office copies of the affidavits, upon which it was granted, were not actually filed when the order was pronounced.<sup>2</sup>

As to the contents of the affidavits to obtain an injunction, it is in general necessary that a plaintiff should swear positively to his title. An injunction has been refused where a plaintiff merely swore, upon his *information and belief*, that he was a remainderman under a settlement.<sup>3</sup> An averment that the plaintiff is entitled in fee simple has also been considered insufficient, as being *too general*; he must set out his title *particularly*,<sup>4</sup> and if the plaintiff's right appears to be *doubtful*, the Court always refuses to interfere.<sup>5</sup>

Upon the same principle it is, as we have seen,<sup>6</sup> required that,

<sup>1</sup> Lord Byron v. Johnston, 2 Mer. 29.

<sup>2</sup> Jackson v. Cassidy, 10 Sim. 326.

<sup>3</sup> Davis v. Leo, 1 Ves. 784.

<sup>4</sup> Whitelegg v. Whitelegg, 1 Bro. C. C. 57.

<sup>5</sup> Field v. Jackson, 2 Dick. 599; Rotherham v. Fanshaw, 3 Atk. 628. As to affidavits of title see Poor v. Carleton, 3 Sumner, 80 to 83; Manser v. Jenner, 2 Hare, 603; Eden Injunc. (2d Am. ed.) 384; Powers v. Heery, R. M. Charl. 523; Higgins v. Woodward, 1 Hopk. 342; Whitelegg v. Whitelegg, 1 Bro. C. C. (Perkins's ed.) 57, note (a), and cases cited; Amelung v. Seekamp, 9 Gill & John. 468; Beatty v. Beatty, 2 Moll. 541; Storm v. Mann, 4 John. Ch. 21; Duvall v. Waters, 1 Bland, 576; Joley v. Stockley, 1 Hogan, 247; Lowe v. Lucey, 1 Irish Eq. 93; S. C. 1 Craw. & Dix, 634. There must be positive evidence of actual title, 2 Mad. Ch. Pr. (4th Am. ed.) 218; Jeremy Eq. Jur. 335, 336; Hough v. Martin, 2 Dev. & Bat. 379; 1 Smith Ch. Pr. (2d Am. ed.) 596; Price v. Meth. Epis. Church, 4 Ham. (Ohio), 547. In Read v. Dews, R. M. Charl. 358, it is said that the general principle to be collected from the books is, that the person applying for an injunction must show an actual or probable right. See also Georgia v. Brailsford, 2 Dall. 402, 415.

<sup>6</sup> Ante, p. 1748; but in Lord Byron v. Johnston, 2 Mer. 29, where the plaintiff was abroad, and an injunction was applied for on his behalf, by his agents, to restrain the publication of a book, in his name, the Court granted the injunction, upon the affidavit of the agent, who did not swear positively that the plaintiff was not the author of the book, but stated circumstances which made it highly proba-

upon an *ex parte* application to restrain the violation of a patent-right, the plaintiff should swear as to his belief at the time of *making the application*, (and not as to his belief at the time he obtained the patent,) that he is the original inventor.<sup>1</sup> So upon a bill to restrain an infringement of copyright, the plaintiff (since the recent determinations at Law) must show that the assignment was in writing if he is the assignee of an assignee; though it will be sufficient to state the assignment under which he himself claims, without producing the assignment to his assignor.<sup>2</sup>

The plaintiff should also, by his affidavit, state some actual violation of his rights, or a sufficient ground to apprehend it; thus, in cases of waste, an affidavit merely as to his apprehension or belief that the defendant intends to commit waste, without stating any grounds for it, will not be sufficient; there must either be some fact, like the marking trees, sending a surveyor, or some threat.<sup>3</sup>

Strictly speaking, *after appearance* by the defendant, an injunction ought not to be ordered, unless upon notice; but in cases of urgency, this will not be required.<sup>4</sup>

It not unfrequently happens, that, where an injunction is required to prevent irreparable mischief, a defendant has not an opportunity of appearing before the order can be made. In this case the injunction may be granted on affidavits of the facts, and on a certificate of the bill having been filed.<sup>5</sup> Even after appearance, in cases of extreme urgency, the Court has granted an injunction

ble that he was not, the defendant (who was served with the notice of the application) refusing to swear to his belief that it was so.

<sup>1</sup> Hill v. Thompson, 3 Mer. 624.

<sup>2</sup> See ante, p. 1748.

<sup>3</sup> Gibson v. Smith, 2 Atk. 182; S. C. Barnard, 491; Jackson v. Cator, 5 Ves. 688; Hanson v. Gardiner, 7 Ves. 309; Etches v. Lance, ib. 417; Hannay v. M'Entire, 11 Ves. 54. Where one has the power and threatens to do the wrong, an injunction will be issued. M'Arthur v. Kelly, 5 Ohio, 139. But an injunction will not be granted to prevent a threatened wrong, unless the danger is imminent, and the injury is irremediable in any other form. Spooner v. McConnell, 1 McLean, 328; Mayor, &c. Rochester v. Curtiss, 1 Clarke, 336.

<sup>4</sup> Marasco v. Bilton, 2 Ves. 112; Harrison v. Cockerell, 3 Mer. 1; Collard v. Cooper, Mad. & Geld. 190; Acraman v. Bristol Dock Co. 1 Ry. & M. 321; Petley v. E. Co. Ry. 8 Sim. 483; Langham v. G. N. Ry. 1 D. & S. 486. The Court is more strict on motion *ex parte* than on notice, where the other side does not appear. Maclaren v. Stainton, 16 Beav. 290; 2 Seton Dec. (3d Eng. ed.) 871.

<sup>5</sup> See Wing v. Fairhaven, 8 Cush. 363.

without notice to the defendant ;<sup>1</sup> but the more usual practice recently has been in such cases to grant what is now called an interim order, by which the defendant is restrained until a particular day mentioned, and liberty is given to the plaintiff to serve notice for an injunction upon some day named. The plaintiff is not unfrequently put upon terms on obtaining such an order, either to abide the order of the Court, as to any damages the defendant may be put to by the interim order, or such other terms as the circumstances of the case require.

The Court will adopt this practice of ordering an injunction on an interim order, without notice before appearance, whenever a case of urgency is established on the affidavits.<sup>2</sup>

<sup>1</sup> Langham v. Great Northern Railway Co. 1 De Gex & Sm. 486 ; Pitley v. Eastern Counties Railway Co. 8 Sim. 483.

<sup>2</sup> See Wing v. Fairhaven, 8 Cush. 363, 364, ante, 1745, 1746, note ; Perry v. Parker, 1 Wood. & Minot, 280. It is only in cases of great urgency, or where irreparable mischief may ensue, that an injunction will be granted before answer. New York Printing Co. v. Fitch, 1 Paige, 97 ; Hartridge v. Rockwell, R. M. Charl. 264, 265 ; Ogden v. Kip, 6 John. Ch. 160, 161. The object of an injunction before answer is to preserve all things in their then condition ; not to determine any right by anticipation, or to undo or restore anything. Murdock's Case, 2 Bland, 461.

In cases of great urgency, or where irreparable injury may ensue, as in waste &c., where the application follows quickly after the injury complained of, the Court will grant the injunction without notice, or appearance, or subpoena served. Hartridge v. Rockwell, R. M. Charl. 260. See Perry v. Parker, 1 Wood. & Minot, 280. But injunctions cannot be granted in the Courts of the United States without notice. Perry v. Parker, 1 Wood. & Minot, 280.

The most usual case in which special injunctions are granted upon affidavit, before answer, are those of waste, or nuisance, by obstructing ancient lights or trespass. The Court will also grant an injunction, before answer, to restrain any of those acts, the performance of which, before the defendant's time for answering is expired, would either defeat the object of the suit or cause serious injury or inconvenience to the party applying. Platt v. Button, 19 Vesey, 447 ; Hill v. Thompson, 3 Mer. 624 ; Mayor, &c. of Rochester v. Curtiss, 1 Clarke, 336. So the Court will, *ex parte*, enjoin the negotiation of a bill of exchange, where it has been fraudulently or improperly obtained, or if it is absolutely void in its creation. Smith v. Haytwell, Amb. 66 ; Hood v. Aston, 1 Russ. 412 ; Lloyd v. Gurdon, 2 Swanst. 180 ; 2 Story Eq. Jur. § 906 ; Darst v. Brockway, 11 Ohio, 462. See also Middleton v. Dodswell, 13 Vesey, 266 ; Mansfield v. Shaw, 3 Mad. 100 ; Echcliff v. Baldwin, 16 Vesey, 267 ; Milligan v. Mitchell, 1 M. & K. 446.

But now in England, the Court will not grant an *ex parte* injunction or an interim restraining order, without the undertaking as to damages, and the registrars are instructed always to insert it. See Chappell v. Davidson, 8 D. M. G. 1 ; 2 Kay & J. 123 ; 2 Seton Dec. (3d Eng. ed.) 870.

It sometimes happens that, upon an application *ex parte* for an injunction, the Court will, if it thinks that the case is so urgent as to require its immediate interference, or that the affidavits in support of it are not positive enough, order notice of the application to be given to the defendant.<sup>1</sup> In such cases, if the defendant has not appeared, the notice of motion must express that leave has been obtained of the Court to serve it;<sup>2</sup> and leave has even been given to give notice of motion for an injunction before a bill is filed.<sup>3</sup>

There appears to have been, formerly, some doubt as to the propriety, in cases of *ex parte* injunctions, of directing the *subpæna* to be served with the injunction, and the practice seems to have been both ways.<sup>4</sup>

<sup>1</sup> See *Lord Byron v. Johnston*, 2 Mer. 29; *Atty.-Genl. v. Utica Ins. Co.* 2 John. Ch. 375; *Mayor &c. of London v. Bolt*, 5 Sumner's Vesey, 129, note (a).

<sup>2</sup> *Hill v. Rimell*, 2 M. & C. 641; *Tackler v. Wilkins*, 6 Beav. 607; *Ramsbottom v. Freeman*, 4 Beav. 145.

<sup>3</sup> *Parker v. Great Northern Railway Company*, 4 De Gex & Sm. 138.

<sup>4</sup> See *Attorney-General v. Nichol*, 16 Vesey, 338. In New Jersey, a *subpæna* must be taken out with the injunction, and made returnable within the time prescribed by the rule for a return of the service of the injunction. *Lee v. Cargill*, 2 Stockt. (N. J.) 331. See also on this point, *Parker v. Williams*, 4 Paige, 439; *Seebor v. Hess*, 5 Paige, 85; *Patrick v. Jackson*, 3 Bro. C. C. (Perkins's ed.) 476, 477, notes.

In Pennsylvania, an injunction cannot be granted until the parties complained of have been served with a *subpæna* to appear and answer; until then they are not in Court. *Blair v. Boggs Township School District*, 31 Penn. (State) 274.

But it is no ground for the dissolution of an injunction, that the *subpæna* could not be served; nor that the injunction itself was served illegally, or without the jurisdiction of the Court. *Corey v. Voorhies*, 1 Green Ch. 5. But where the plaintiff omits to have the *subpæna* served and returned, at the term to which it is made returnable, the injunction will be dissolved. *West v. Smith*, 1 Green Ch. 309.

An injunction was dissolved on the appearance and motion of the defendant, because it did not appear that the plaintiff had endeavored to have the process served. *Hightour v. Rush*, 2 Hayw. 351. See *West v. Smith*, 1 Green Ch. 309; *Payne v. Cowan*, 1 Smedes & Marsh. Eq. 27. Where the plaintiff neglects to serve a *subpæna* upon a defendant against whom an injunction has been granted affecting his rights, such defendant may appear voluntarily and apply to have the injunction dissolved, without waiting for the service of the *subpæna*. *Waffle v. Vanderheyden*, 8 Paige, 45.

On a motion to dissolve an injunction on the ground that the *subpæna* has not been served, the sheriff's return to the *subpæna* is conclusive, and cannot be contradicted by affidavit, unless collusion be shown between the sheriff and the plaintiff or his solicitor. *Carey v. Voorhies*, *supra*.

In Maryland, the fact that the bill was not filed until after the injunction was

The writ of *subpœna* has now been abolished, and a printed copy of the bill is served upon the defendant in lieu of the old writ; but to prevent delay arising from the time required to print the bill, it is expressly enacted by 15 & 16 Vict. c. 86, that "The Clerks of Records may receive and file a written copy of any bill of complaint, praying a writ of injunction or a writ of *ne exeat*, signed and filed for the purpose, either solely or amongst other things, of making an infant a ward of Court, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy of such bill within fourteen days, and every bill of complaint so filed shall be deemed and taken to have been filed at the time of filing the written copy thereof; and a written copy of any such bill of complaint stamped as aforesaid, and with such indorsement thereon as aforesaid, may be served on any defendant thereto, and such service shall have the same effect as the service of a printed copy."

The orders pronounced by the Court in cases of special injunctions before answer have varied at different periods. In some cases, the injunction has been till "*appearance* and further order";<sup>1</sup> in others, till "*answer* and further order."<sup>2</sup> But the form, now that an answer is not essential, is until the hearing of the cause.<sup>3</sup>

ordered, is held, at most, to be a mere irregularity, which cannot operate a reversal of the order granting it. *Davis v. Reed*, 14 Maryland, 152.

Under the practice in California an injunction is ordinarily to be asked for before the bill is filed, so that it can issue with the summons, though it does not take effect until the filing of the bill. *Heyman v. Landers*, 12 Calif. 107. And in New York an injunction order may be allowed, signed, and delivered to the officer before the defendant is summoned, but cannot legally be served before the summons. *Leffingwell v. Chave*, 5 Bosworth (N. Y.) 703.

<sup>1</sup> *Lord Grey de Wilton v. Saxon*, 6 Ves. 106.

<sup>2</sup> *Potter v. Chapman*, 1 Dick. 146; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; 2 Dick. 703. It is by mistake stated, in Mr. Coxe's Report, to have been till "answer or further order," Reg. Lib. B. 1784, fol. 143; *Drury v. Molins*, 6 Ves. 328; *Lord Tamworth v. Lord Ferrers*, ib. 419.

<sup>3</sup> See *Read v. Dews*, R. M. Charl. 360, 361; *Read v. Consequa*, 4 Wash. C. C. 174; *Minturn v. Seymour*, 4 John. Ch. 173; *James v. Jefferson*, 4 Hen. & Munf. 483. Where an injunction is granted until the answer comes in, the injunction is not dissolved by the coming in of the answer, but is a subsisting injunction until it is dissolved by subsequent order. *Turner v. Scott*, 5 Rand. 332. But see *Beal v. Gibson*, 4 Hen. & Munf. 481.

Injunctions may be dissolved before answer filed, or afterwards, or after de-

An order for a special injunction, having been obtained, must be drawn up, passed and entered in the same manner as any other order. It frequently happens, however, (especially if the order is made in vacation, when the offices are closed,) that the matter is so urgent that the object of the injunction might be defeated if the party were bound to wait till the order could be passed and the writ issued upon it; in such cases, the practice is to serve the party *personally* with notice in writing, that the injunction has been ordered, and that it will be sealed and served as soon as it can be passed through the offices, or else to procure a transcript of the minutes of the order signed by the Registrar, and to serve the same personally by delivering a copy of it, showing, at the same time, the original transcript so signed; and either the notice or the copy of the minutes will be sufficient to render the defendant guilty of a contempt if he acts in opposition to the injunction.<sup>1</sup> Moreover, a person, having notice of the order being pronounced, is bound from the date of the order.<sup>2</sup> In such case, however, there must be no delay in endeavoring to get the order drawn up and the injunction under seal, and serving it when obtained.<sup>3</sup>

murrer. *Jones v. Com. Bank of Columbus*, 5 Howard (Miss.) 43. In cases of irreparable mischief, the dissolution of an injunction rests in the sound discretion of the Court, whether applied for before or after answer. *Poor v. Carleton*, 3 Sumner, 70; ante, 1768, note; *Read v. Dews*, R. M. Charlt. 358; *Read v. Consequa*, 4 Wash. C. C. 174; *Minturn v. Seymour*, 4 John. Ch. 173.

<sup>1</sup> *Vansandau v. Rose*, 2 J. & W. 264; *M'Neil v. Garrett*, 1 Cr. & P. 98.

<sup>2</sup> *Osborne v. Tennant*, 14 Ves. 136; *James v. Owens*, 18 Ves. 524; *Rattray v. Bishop*, 3 Mad. 220. In *Ramsdall v. Craighill*, 9 Ohio, 197, it was held that an injunction operates only from the time process is served. See *Elliott v. Osborne*, 1 Cal. 396. No particular form is necessary to the writ. The substantial requirement is an authentic notification to the defendants of the order of the Court, which they must then, at their peril, obey. *Summers v. Farish*, 10 Cal. 347.

<sup>3</sup> *Vansandau v. Rose*, *ubi supra*. A writ of injunction ought to be sufficiently explicit upon its face to apprise the party, upon whom it is served, as to what he is restrained from doing; without the necessity of his resorting to the plaintiff's bill, to ascertain what the injunction means. *Sullivan v. Judah*, 4 Paige, 444; *Moat v. Holbien*, 2 Edw. 188. It should be clear and explicit in its terms, and should not deprive the defendant of any right which the case made by the bill does not require he should be restrained from exercising. *Laurie v. Laurie*, 9 Paige, 234. But a defect in the injunction will be cured by the defendant putting in his answer and moving to dissolve. *Davile v. Peacock*, Barnard, 27; *Parker v. Williams*, 4 Paige, 439.

*Bond.* In New Jersey, no injunction shall be allowed to stay the proceedings in an ejectment suit, after issue joined thereon, unless the plaintiff shall give bond

## SECTION II.

*Of Continuing or Granting Injunctions at the Hearing.*

It frequently happens, that where an injunction has been obtained before the hearing, upon an interlocutory application, it will be continued by the decree made at the hearing of the cause.<sup>1</sup>

Injunctions are continued at the hearing either *provisionally* or *permanently*.<sup>2</sup> They have been continued provisionally pending inquiries or an account preparatory to a final adjudication upon further directions.<sup>3</sup>

Injunctions are permanently continued or made perpetual by the decree in those cases where the party enjoined is in possession of some instrument conferring a legal right, which it is contrary to Equity that he should be permitted to exercise to the detriment of the plaintiff.<sup>4</sup>

with sufficient sureties, conditioned for the payment of all such damages and costs as may be awarded to the opposite party, either at Law or in Chancery, in case of a decision against the plaintiff. Chancery Rule IX. § 6. So bonds may be required when an injunction is granted *ex parte*. ib. § 7. But a Court of Equity cannot order the plaintiff and his sureties on an injunction bond to pay the damages sustained by reason of the injunction. The defendant must resort to an action on the bond. *Merryfield v. Jones*, 2 Curtis C. C. 306 ; *Bean v. Heath*, 12 Howard U. S. 168.

<sup>1</sup> Seton on Decrees, 300. If it is not in terms continued at the hearing it will be superseded by the decree. <sup>2</sup> Seton Dec. (3d Eng. ed.) 941. The granting and continuing of injunctions lie in the sound discretion of the Court. *Roberts v. Anderson*, 2 John. Ch. 202 ; *Poor v. Carlton*, 3 Sumner, 70.

<sup>3</sup> See 2 Seton Dec. (3d Eng. ed.) 943 *et seq.*

<sup>4</sup> *Old v. Old*, *ibid.*

<sup>4</sup> As for example, a bond and mortgage, void by reason of the obligor and mortgagor being under age. *Colcock v. Furguson*, 3 Desaus. 482. See *Allen v. Minor*, 2 Call, 70. So a recognizance, where bail, having become fixed at law, are, under the equity of the case, entitled to be discharged. *Rathbone v. Warner*, 10 John. 587. So a judgment, rendered on a bond obtained by fraud. *Kruson v. Kruson*, 1 Bibb, 184. So a judgment, which is satisfied. *Brinckerhoff v. Lansing*, 4 John. Ch. 69. So a void judgment, though it is obvious the party seeking the aid of Equity could obtain relief in a Court of Law. *Caruthers v. Hartsfield*, 3 Yerger, 366. An injunction will be made perpetual, to prevent the record of a deed void, as forged and fraudulent, from being used as evidence of title. *Bushnell v. Harford*, 4 John. Ch. 302. So an injunction was made perpetual, where it appeared that the defendant's mill-dam injured the health of the plaintiffs, although an indictment for the same nuisance was still pending

Therefore, where the plaintiff gave to the defendant three promissory notes for a particular purpose, on his undertaking to make no improper use of them, but afterwards the defendant, contrary to his promise, put the notes in suit against the plaintiff, who thereupon filed a bill praying that the notes might be delivered up to be cancelled, and that the defendant might be restrained, by injunction, from proceeding upon them, the Court, at the hearing, directed that a perpetual injunction should issue, and that it should extend to restrain the indorsing and further negotiation of the notes.<sup>1</sup>

It is to be remarked, however, that the general course of the Court, where a party is in possession of a security or other instrument, which it is against conscience that he should use against the defendant, is to direct it to be delivered up and cancelled ; a course which it will even adopt where the instrument is void in Law, although it has been sometimes doubted whether this remedy is applicable to cases of this description, as the circumstances which render the instrument void at Law might be shown or pleaded there to any action which might be brought upon such an instrument.<sup>2</sup>

The practice of extending injunctions at the hearing so as to render them perpetual, is not confined to cases in which the parties are in a position to annoy the plaintiff, by proceedings which he may have a legal right to institute, but it is applied to prevent a continuation or repetition of acts for which the party has no legal authority whatever ; thus, injunctions to restrain waste or the in-

Attorney-General *v. Hunter*, 1 Dev. Eq. 12. So, to prevent a party from shutting up an alley, who, upon the promise of keeping it open, has induced a vendee to make a purchase or to pay a higher price for property adjoining upon it. *Trueheart v. Price*, 2 Munf. 468. For other cases where a perpetual injunction will be allowed, see *Armstrong v. Hickman*, 6 Munf. 287 ; *Willbanks v. Duncan*, 4 Desaus. 536 ; *Gouverneur v. Titus*, 1 Edw. Ch. 477 ; *Breevort v. McJimsey*, 1 Edw. Ch. 551 ; *Thomas v. Brashear*, 4 Monroe, 68 ; *Nicoll v. Trustees of Huntington*, 1 John. Ch. 166 ; *Trustees of Louisville v. Gray*, 1 Litt. 148 ; *Newburg Turnpike Co. v. Miller*, 5 John. Ch. 111 ; *Belknap v. Belknap*, 2 John. Ch. 463 ; *Eden Injunct.* (2d Am. ed.) 410, *et seq.* and notes.

<sup>1</sup> *Chennel v. Churchman*, and *Minshaw v. Jordan*, Rolls, cited 3 Bro. C. C. 16 ; and see *ibid.* ed. Belt, n. ; see, also, *Hannington v. Du Chatel*, 1 Bro. C. C. 124 ; S. C. 2 Dick. 581 ; S. C. 3 Woodeson Lect. 459, n. ; as reported in 2 Swanst. 159, n.

<sup>2</sup> See 2 Swanst. 157, n., where all cases on this subject are collected, *Simson v. Lord Howden*, 3 M. & C. 97 ; 2 Story Eq. Jur. § 699 to § 707 ; *Bromley v. Holland*, 5 Sumner's Vesey, 610, note (a), and cases cited.

fringement of a patent may be made perpetual at the hearing. So, also, may injunctions to restrain the piracy of a publication,<sup>1</sup> or to restrain the use by one tradesman of the trade-marks of another.<sup>2</sup>

It is to be observed, that to support a decree for a perpetual injunction, the Court requires that there should be no doubt in the case.<sup>3</sup>

It may be noticed, in this place, that, in order to entitle a plaintiff to a decree for a perpetual injunction at the hearing, it is not absolutely necessary that he should previously have obtained one upon interlocutory application, and that, though he may have failed, upon the answer of the defendant to obtain or support his injunction, he has been permitted to claim it at the hearing;<sup>4</sup> and the case will be the same though he may not have made any application for an interlocutory injunction.

But the not having moved for an injunction imposes on the plaintiff, in such case, the obligation of making out a clear and unexceptionable title at the hearing, and, if he fails in that and has not previously obtained an injunction, he will not be allowed to use the facts proved in the cause as evidence of a *prima facie* case giving him a right to further time, for the purpose of enabling him to establish more satisfactorily his legal title.<sup>5</sup>

It is to be observed that the principles laid down in the above case will not, of course, apply to those cases in which the Court only grants injunctions at the hearing of the cause, as in the case of bills to restrain the setting up of outstanding terms, and others of that description.

<sup>1</sup> *Macklin v. Richardson*, Amb. 696; S. C. Seton on Decrees, §15; *Mantey v. Owen*, 4 Burr. 2329, was brought to a hearing, and a perpetual injunction decreed, see 13 Ves. 502. The case of Gay's works, in 1837, is also mentioned as one in which the injunction was made perpetual. 1 Bl. 308. In *Millar v. Taylor*, 4 Burr. 2303, 2417, Mr. Justice Willes remarked that, for sixty years before that time, there had not been more than two or three causes of this description brought to a hearing, the reason which he states to be, — that if the injunction is acquiesced in, it is seldom worth the plaintiff's while to go for the account, ib. 2324. See also *Colburn v. Simms*, 2 Hare, 543; *Kelly v. Hooper*, 1 Y. & C. 197.

<sup>2</sup> *Millington v. Fox*, 3 M. & C. 338.

<sup>3</sup> *Whittingham v. Wooler*, 2 Swanst. 428, n.; *Baily v. Taylor*, 1 R. & M. 73. A perpetual injunction will not be granted to restrain the defendant from bringing suits for a continued trespass, the right not having been determined at law. *Eldridge v. Hill*, 2 John. Ch. 282.

<sup>4</sup> *Baily v. Taylor*, 1 R. & M. 76.

<sup>5</sup> *Bacon v. Spottiswoode*, 1 Beav. 384; S. C. *Bacon v. Jones*, 4 M. & C. 433.

It may be mentioned here, that if an injunction has been obtained upon an interlocutory order, and it is intended to continue it at the hearing, care must be taken to introduce a direction to that effect in the decree, otherwise it will drop.

With respect to the cases in which the Court will decree perpetual injunctions at the hearing of the cause, it may be mentioned, that if a decree has been made for the performance of trusts, the defendant will be perpetually enjoined from setting up a legal estate in order to overturn it.<sup>1</sup> So if a will is established against an heir who suffers the bill to be taken *pro confesso* against him, (as that, in effect, is confessing he has no claim,) and if he permits the decree or order by which he is excluded, to be made absolute, (which is, in effect, admitting that if he had any claim he was thereby abandoning it,) the Court will enforce the decree or order until it be duly reversed; and it will grant, for that purpose, a perpetual injunction.<sup>2</sup>

Perpetual injunctions will also be decreed where the same question has been frequently litigated in the same manner, or where it is likely to be contested in a multiplicity of suits. This is the foundation for a bill of peace where it is necessary to quiet the rights after repeated ejectments;<sup>3</sup> for such a proceeding, unless prevented, would become oppressive to the opposite party,<sup>4</sup> or, where there is one general right to be established against a great number of persons, as the right of a parson against his parishioners for tithes, or the right of parishioners against a parson for his modus, or the rights of a lord of the manor against his tenants for encroachments, or the right of the tenants against the lord for disturbance; for, as the difficulties would be insuperable if each of the parties should attempt to determine their particular rights by separate and distinct actions, the Court will put the whole in peace by a perpetual injunction.<sup>5</sup>

<sup>1</sup> *Askew v. Poulterers' Company*, 2 Ves. 90; *Buckingham v. Buckingham*, 2 Eq. Ca. Ab. 527.

<sup>2</sup> *Selby v. Selby*, 2 Dick. 678.

<sup>3</sup> 2 Story Eq. Jur. § 852 to 868; *Eldredge v. Hill*, 2 John. Ch. 281, 282; *Alexander v. Pendleton*, 8 Cranch, 462, 468; *Eden Injunc.* (2d Am. ed.) 416 *et seq.* and notes.

<sup>4</sup> *Leighton v. Leighton*, 1 P. Wms. 671; 1 Str. 404; 4 Bro. P. C. 378; *Devonsher v. Newenham*, 2 Sch. & Lef. 211; *Bath, Earl of, v. Sherwin*, 10 Mod. 1; 4 Bro. P. C. 373.

<sup>5</sup> *Lord Tenham v. Herbert*, 2 Atk. 483; *Mayor of York v. Pilkington*, 1 Atk. 282; *Conyers v. Lord Abergavenny*, *ib.* 285.

It is to be observed that an injunction is never made perpetual but upon the hearing of the cause;<sup>1</sup> when, however, it is once made perpetual, it seems to be so far final, as to remain in force notwithstanding the death of the party; for, if it were necessary to revive upon every abatement, that would be, in effect, a perpetual suit.<sup>2</sup> With regard to injunctions which are not perpetual or have not been made so by decree, they, also, continue in force notwithstanding the suit has abated, and the ordinary course, in such cases, for the party enjoined, if he wishes to get rid of the injunction, is to move that the plaintiff, or his personal representative, may revive within a given time, or else that the injunction may be dissolved.<sup>3</sup>

Before we proceed to the consideration of the method of vindicating the authority of the Court, in cases where it has been impugned by a breach of its injunction, it is necessary that we should consider what the effect of an injunction is, and upon whom it will be binding.

With respect to injunctions to stay proceedings at Law, where a declaration has not been delivered, the injunction usually restrains all proceedings whatever; but *where the declaration has been delivered*, the plaintiff at Law may proceed to trial, the injunction then *staying execution* only.<sup>4</sup>

This distinction arises from the construction which has been given to the following clause, which has always been inserted at the end of the writ which issues in the Court of Chancery, — “*But nevertheless, the said defendant is at liberty to call for a plea, and to proceed to trial thereon; and, for want of a plea, to enter up judgment, but execution is hereby stayed.*” It has been held, that, by virtue of this proviso, the delivery of a declaration is no breach of the injunction. The construction being, that it only applies to a person *in a condition to demand a plea*; and that if the action at Law has not been commenced, or the declaration has not been delivered, when the order for the injunction is made, the plaintiff

<sup>1</sup> For. Rom. 194, except by consent. See *Morrell v. Pearson*, 12 Beav. 284.

<sup>2</sup> *Askew v. Townshend*, 2 Dick. 471, cited 3 Ves. 197, *sub nom.* *Ascough v. Townshend*.

<sup>3</sup> *Jones v. Massey*, and *Turner v. Cole*, cited in *Chowick v. Dismes*, 3 Beav. 290.

<sup>4</sup> Harr. ed. Newl. 541; 1 Turn. & V. 362.

at Law, notwithstanding these words, is not at liberty to take any step which will enable him to demand a plea.<sup>1</sup>

It has also been determined, that the words "*for default of plea*," mean for default of an *issuable plea*; and further, that as the plaintiff may, by the express terms, try an issue on the *fact*, by the same reason he may try an issue of *Law*.<sup>2</sup>

The construction also given to the words "*to enter up judgment*," has been that they apply to a *final judgment*; all that the Court intends to restrain is execution. The plaintiff may, therefore, proceed so far as to place himself in a situation in which he may be able to take out execution the instant that the injunction is dissolved; consequently, after an interlocutory judgment, as by default or on demurrer, the plaintiff at Law may go on to ascertain his damages.<sup>3</sup> Where the defendant in Equity had brought an action against the plaintiff, as executor, and on *plene administravit* pleaded, took judgment *de bonis testatoris cum acciderint*, and afterwards took out a *scire facias*, in order to inquire after assets; it was said, that the *scire facias* was in the nature of a new action after judgment; and that this was a breach of the injunction, being a proceeding after judgment: it was, however, held, that it was no breach, being only a continuation of the old action on the same record, and in the nature of a proceeding after an interlocutory judgment to a final one.<sup>4</sup> It is scarcely necessary to cite a case to show that it is not a breach to show cause against a rule for a new trial;<sup>5</sup> but where an injunction had been obtained to restrain the defendant from taking possession under a verdict which he had obtained in ejectment and previous to the issuing the injunction, the costs of the action had been taxed, and a writ of possession executed, the plaintiff at Law, having afterwards procured an attachment for non-payment of the costs taxed, was considered as guilty of a breach of the injunction.<sup>6</sup>

<sup>1</sup> *Sidney v. Hetherington*, 3 P. Wms. 147, n.; *Bullen v. Ovey*, 16 Ves. 141; *Mills v. Cobby*, 1 Mer. 3; *Eden on Injunct.* 69.

<sup>2</sup> *Morrice v. Hankey*, 3 P. Wms. 146; *Sidney v. Hetherington*, 3 P. Wms. 147, n.

<sup>3</sup> 3 P. Wms. 147.

<sup>4</sup> 3 P. Wms. 147; *Morrice v. Hankey*, 146; and see *Franco v. Franco*, 2 Car. 420.

<sup>5</sup> *Whitemore v. Thornton*, 3 Pri. 241.

<sup>6</sup> *Partington v. Booth*, 3 Mer. 148; and see *Chaplin v. Cooper*, 1 V. & B. 16.

An injunction to restrain proceedings at Law is directed to the defendant, his *counsellors, attorneys, solicitors and agents*, and a special injunction to restrain waste, &c., is usually directed to the party, *his servants, workmen and agents*; consequently, if the counsellors, attorneys, &c., of the party, in the first case, or his servants, workmen or agents in the second, having had notice of the injunction, do anything inhibited by it, they will be guilty of a contempt.<sup>1</sup>

With respect to what will be considered as a breach of other injunctions, that must depend entirely upon the form of the injunction and the nature of the act to be prohibited.<sup>2</sup>

An injunction operates from the date of the order, and not from the sealing of the writ; and it is to be observed, that although an injunction be irregularly obtained, it is still an order of the Court and must be discharged before it can be disobeyed. Where, however, the defendant and his solicitors had been guilty of a breach of an injunction which was irregular, Lord Eldon refused to commit them, but ordered them to pay the costs occasioned by the breach of injunction and of the motion to commit.<sup>3</sup>

Before the Court will punish for a breach of an injunction, it must be clear that the party knew that the injunction had been issued;<sup>4</sup> strictly speaking, he ought to be served with the writ

<sup>1</sup> See *Lewes v. Morgan*, 5 Pri. 518.

<sup>2</sup> See *St. John's College v. Carter*, 4 M. & C. 497; *Rodgers v. Nowill*, 3 De G., Mac. & Gor. 614; *Eden Injunct.* (2d Am. ed.) 96 *et seq.*; *Lansing v. Easton*, 7 Paige, 364; *M'Credie v. Senior*, 4 Paige, 378. Nothing can be deemed a breach of an injunction forbidding the disturbance of a right of way which does not interfere with its free exercise. *Bosley v. Susquehanna Canal*, 3 Bland, 68.

<sup>3</sup> *Partington v. Booth*, 3 Mer. 148. Where an injunction is in operation, a party should respect it, although improperly issued. *Moat v. Holbein*, 2 Edw. Ch. 188. The Court will take into consideration the fact, that the injunction was erroneously granted, and without sufficient equity to sustain it, in determining the extent of the punishment to be imposed upon the party who has been guilty of a breach of it. *Sullivan v. Judah*, 4 Paige, 444.

<sup>4</sup> See *Androscoggin & Kennebec R. R. Co. v. Androscoggin R. R. Co.* 49 Maine, 392. On affidavits of a breach of an injunction to stay waste and of personal service of a copy of the affidavits, and notice of the motion, an attachment was ordered to bring up the defendant to answer for the contempt. *Schoonmaker v. Gillet*, 3 John. Ch. 311. See *Rutherford v. Metcalf*, 5 Hayw. 60.

For form of committal for breach of an injunction, see 2 Seton Dec. (3d Eng. ed.) 945. Since *Re Vansandau*, 1 Ph. 605, it is usual to insert in the order an express adjudication on the contempt, as held the better form in a case of special contempt; but such adjudication is not essential. S. C. 2 Seton Dec. (3d Eng. ed.) 945.

itself, under the seal of the Court, in the manner already pointed out, but circumstances will justify a committal without the actual service of the writ, as where the matter is pressing and there is not time to procure the writ; or where the order is made in vacation, when the offices are closed: in such cases, the service of the writ will be dispensed with, and a service of a copy of the minutes of the order, or of a notice of their having been passed, will be sufficient.

In some cases, a committal may be ordered, where neither the writ nor the minutes of the order have been served, nor any personal notice given; thus it was held, by Lord Hardwicke, that if the person was in Court at the time the order for an injunction was pronounced, that alone would be sufficient notice.<sup>1</sup> So also, if he is informed that the injunction has been granted, and there has been no delay on the part of the plaintiff in endeavoring to get the order drawn up, the defendant will be committed for the breach of it; because it would be a contempt to act contrary to such an order, when he knew the order was made.<sup>2</sup> In these and the like cases all the mischief might be done, and the Court might as well grant no injunction at all, unless this kind of notice was to be held sufficient before the great seal was actually applied to the writ. In the instance of an injunction against committing waste, the party in the interval might lay the axe to the trees; or if it was against marrying a ward of Court, the marriage might be had next morning by a license fraudulently obtained.

In short, the Court will not, under such circumstances, permit a man to elude its justice by doing that before the injunction is sealed, which, if it was actually sealed, would be a contempt. But the plaintiff must not be guilty of any unnecessary delay, either in getting the order drawn up, or in serving it when obtained; for though the Court will prevent his losing the benefit of the process, while he is actually pursuing it, yet it cannot consider him as entitled to that order for three or four months together.<sup>3</sup>

<sup>1</sup> Anon. 3 Atk. 567; *Skip v. Harwood*, ib. 564.

<sup>2</sup> *Kimpton v. Eve*, 2 V. & B. 349; *Vansandau v. Rose*, 2 J. & W. 264; *Endicott v. Mathia*, 1 Stockt. (N. J.) 110.

<sup>3</sup> *James v. Downes*, 18 Ves. 522. A want of due diligence on the part of the plaintiff after obtaining an injunction is always a cause for dissolving it. *Depeyster v. Graves*, 2 John. Ch. 204. See *Seebor v. Hess*, 5 Paige, 85; *Higgins v. Woodward*, 1 Hopk. 842.

Where a party has been guilty of a contempt by the breach of an injunction, the proper course of proceeding, if he be not a Peer or otherwise entitled to privilege of Parliament, is to obtain an order for his committal.<sup>1</sup>

This order must be obtained upon motion, of which notice must have been duly served upon him *personally*. And it is to be observed that the terms of the notice of motion should be that the party "*may stand committed*" to the Queen's Prison, for breach of the injunction, and not "*that he may show cause why he should not be committed.*"<sup>2</sup> The plaintiff, however, may, as it seems, obtain an order *ex parte* that the defendant may stand committed on a certain day unless he shows cause against it, which order must be *personally* served upon the party to be committed. But, whether it be the order *nisi*, or a notice of a motion for an absolute committal, the service must be personal, unless where the defendant has absconded: in which case, an order may be obtained that service on his solicitor or at his last place of abode shall be deemed good service; and, upon that service, under such circumstances, he may and will be committed.<sup>3</sup>

An affidavit of the personal service of the notice of motion, or of the order *nisi*, should of course be prepared and filed, and on the day named in the notice, the motion should be made by the counsel for the plaintiff, for the commitment; but, if an order *nisi* has been obtained and served, the application should be, that it may be made absolute.

Lord Cottenham held, that if a party having notice of an injunction is guilty of a breach of it, he may be committed without the production of the writ.<sup>4</sup>

<sup>1</sup> *Angerstein v. Hunt*, 6 Ves. 488. The practice formerly was, that, upon affidavit of service of the injunction, an attachment would issue for the breach of it. If the defendant was arrested upon the attachment, and entered his appearance with the Registrar, interrogatories were filed and exhibited against him, to which he must answer upon oath. If he denied the service, the other party might examine witnesses to prove it, and, if proved, the Court made him pay all costs and charges before he could be discharged. Harr. ed. Newl. 551. No motion made after the dissolution of an injunction for an attachment, on the ground of an infringement of it while in force, can be sustained. *Moat v. Holbein*, 2 Edw. Ch. 188.

<sup>2</sup> *Ibid.* 552. When the injunction is that he may do a particular thing, the order is, that he may do it by a particular day, or stand committed. *Durant v. Moore*, 2 R. & M. 38.

<sup>3</sup> *Sir W. Pulteney v. Shelton*, 5 Ves. 147; *Pearce v. Crutchfield*, 14 Ves. 206.

<sup>4</sup> See *Endicott v. Mathis*, 1 Stockt. (N. J.) 110; *Newark Plank Road Co. v.*

It is to be observed, however, that the decision of Lord Cottenham applies only to cases in which it may be necessary to apply to the Court to punish for a breach of the injunction committed before the injunction has been issued, and not to cases in which the application is made after the injunction has been issued and served.

If, when the motion is brought on, the other side is not prepared to resist it, the Court usually gives him a day to show cause against it; and then, upon hearing the affidavits, the Court decides whether the party is guilty of the breach of the injunction or not, and, if he be guilty, makes an order for his commitment.<sup>1</sup>

The effect of a committal for a breach of injunction is usually that of retaining the offender in prison until he submits and pays the adverse party his costs.<sup>2</sup>

It is to be observed, however, that if the breach of injunction was the result rather of an error in judgment than of a wilful contempt, the Court will not direct a commitment, but will merely order the party to pay costs incurred by the breach of the injunction and by the application.<sup>3</sup>

Elmer, 1 Stockt. (N. J.) 754; *People v. Sturtevant*, 5 Selden, 277; *Hale v. Thomas*, 3 Edw. Ch. 236; *Androscoggin & Kennebec R. R. v. Androscoggin R. R.* 49 Maine, 392.

<sup>1</sup> A party alleging a contempt of Court by breach of an injunction, must make it out clearly to the satisfaction of the Court. *Magennis v. Parkhurst*, 3 Green Ch. 433. If the accused deny the contempt, or do not clearly show it by his answers to interrogatories exhibited to him, the prosecutor may examine witnesses to prove it; and on the other hand the accused party may examine witnesses to exculpate himself from the charge. *Magennis v. Parkhurst*, *supra*.

<sup>2</sup> Harr. ed. Newl. 552. Where the accused is discharged, because the contempt is not proved, the plaintiff is not usually required to pay costs. *Magennis v. Parkhurst*, 3 Green Ch. 433, 436. Where there has been an actual breach of an injunction, the statute of New York gives the Court no discretion, but requires the infliction of a fine sufficient to indemnify the plaintiff for the injury sustained by such breach, and the costs and expenses. And the defendant cannot, in such a case, be discharged from imprisonment, without the consent of the prosecutor, until the fine is actually paid. *Lansing v. Easton*, 7 Paige, 364; *People v. Spaulding*, 2 Paige, 330. There is no such statute in New Hampshire; and where there is no such statute, the plaintiff in the suit can be no farther indemnified for the delay and expense which he has suffered, than the costs which he recovers in the proceeding may operate as an indemnity. *Buffum's Case*, 13 N. Hamp. 14.

<sup>3</sup> *Partington v. Booth*, 3 Mer. 148; see, also, the *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107. The fact that the defendant, in violating the injunction,

The plaintiff may, also, by his acquiescence in the breach, dispense with the ordinary process; though, strictly speaking, no act of the parties can amount to a waiver of a contempt of the Court.<sup>1</sup>

Peers and others entitled to privilege of peerage, and Members of the House of Commons, are not liable to be committed for a breach of an injunction, but the Court will order a sequestration to issue.<sup>2</sup>

The same course of proceeding may be adopted in the case of a corporation aggregate.

It has already been observed, that, although an injunction be irregular, a party, acting in contravention of it, will be guilty of a contempt.<sup>3</sup> The proper course, where there is an irregularity in the injunction, is to apply to discharge it.<sup>4</sup>

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At any period after an injunction has been granted, it is competent to the parties to apply, by motion to the Court, for its dissolution.<sup>5</sup> Of this motion due notice must be given to the plaintiff's acted under erroneous advice of counsel, will not protect him in New York from a fine sufficient to compensate the adverse party for the injury sustained; although such advice may protect him from further punishment. *Lansing v. Easton*, 7 Paige, 364; *Hawley v. Bennet*, 4 Paige, 163. See *Buffum's Case*, 13 N. Hamp. 14.

<sup>1</sup> *Mills v. Cobby*, 1 Mer. 3.

<sup>2</sup> See *Robinson v. Lord Byron*, 2 Dick. 703; *Marquis of Downshire v. Lady Sandys*, *ubi supra*.

<sup>3</sup> Ante, p. 1782; and see *Marquis of Downshire v. Sandys*, 3 Mer. 107. See *Androscoggin & Kennebec R. R. Co. v. Androscoggin R. R. Co.* 49 Maine, 392.

<sup>4</sup> *Robinson v. Lord Byron*, *ubi supra*; *Partington v. Booth*, 3 Mer. 149; *Read v. Davis*, R. M. Charl. 358.

<sup>5</sup> *Minturn v. Seymour*, 4 John. Ch. 173; *Chesapeake & Ohio Canal Co. v. B. & O. R. R. Co.* 4 Gill & John. 7. As to oral examination of witnesses on such motion, see *Normanville v. Stanning*, 10 Hare, App. 20; 2 Seton Dec. (3d Eng. ed.) 941 *et. seq.* Where an injunction is granted *ex parte*, the Court will, at any time, hear a motion to dissolve for want of Equity, unless for special cause. *Morris Canal &c. Co. v. Biddle*, 3 Green Ch. 222. And such motion will be heard before answer filed. *Ib.* See *Wing v. Fairhaven*, 8 Cush. 363, ante, 1745, 1746, note. It is no objection to the dissolution of an injunction in New Jersey, that exceptions have been filed to the defendant's answer. The Court in that State will hear the argument upon the exceptions to the answer, and upon the motion to dissolve the injunction, at the same time. *Wyckoff v. Cochran*, 3 Green Ch. 420. Where the dissolution of an injunction has been obtained by fraud, it may be reinstated. *Billingslea v. Gilbert*, 1 Bland, 568. See *Gillian v. Allen*, 1 Rand. 414; *Beal v. Gibson*, 4 Hen. & Munf. 481; *Radford v. Innes*, 1 Hen. & Munf. 8.

solicitor. It would appear that one of several defendants, against whom an injunction has been granted, cannot alone move to dissolve it, but there may be some doubt as to this practice.<sup>1</sup> If the defendant has filed an answer he may use his own answer on the motion as an affidavit, otherwise the motion must be supported by affidavits.<sup>2</sup> If the injunction has been obtained by a conceal-

<sup>1</sup> *Thompson v. Geary*, 5 Beav. 131; but see *Lewis v. Smith*, 7 Beav. 470. As a general rule, all the defendants, in order to obtain the dissolution of an injunction, must answer the equity of the bill. But the qualification of the rule is, that it is enough, if those defendants answer, upon whom the gravamen of the charge rests. *Adams v. Hudson Co. Bank*, 2 Stockt. (N. J.) 540; *Vliet v. Lowmason*, 1 Green Ch. 404, and note; *Stoutenburgh v. Peck*, 3 Green Ch. 446; *Price v. Clavenger*, 2 Green Ch. 207; *Jones v. Magill*, 1 Bland, 190; *Stewart v. Barry*, ib. 172; *Williams v. Hall*, ib. 194; *Chapline v. Betty*, ib. 197; *Tony v. Oliver*, ib. 199; *Higgins v. Woodward*, Hopk. 342; *Coleman v. Gage*, 1 Clarke, 295; *Vandervoort v. Williams*, 1 Clarke, 377; *Cape Sable Co.'s case*, 3 Bland, 606; *Wakeman v. Gillespy*, 5 Paige, 112; *Noble v. Wilson*, 1 Paige, 164; *Depeyster v. Graves*, 2 John. Ch. 168.

<sup>2</sup> In *Poor v. Carleton*, 3 Sumner, 73, 74, it is remarked by Mr. Justice Story, that, "In cases of special injunctions, there are two points which seem well established in practice; first, that the dissolution of the injunction is not of course upon the coming in of the answer, denying the merits; and, secondly, that upon the motion to dissolve such an injunction, the plaintiff, under some circumstances, is entitled to read affidavits in contradiction to the answer, not indeed to all points, but to many points." "If the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But there are exceptions to the doctrine, and these, for the most part, are fairly resolvable into the principle of irreparable mischief; such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violation of copyrights, or of patent rights. In cases of this sort, the Court will look into the whole circumstances, and will continue or dissolve the injunction in the exercise of a sound discretion. See also *Clum v. Brewer*, 2 Curtis C. C. 506; *Moore v. Hylton*, Dev. Eq. 429; *Bank of Munroe v. Schermerhorn*, 1 Clarke, 303; *Tong v. Oliver*, 1 Bland, 199; *Williams v. Hall*, ib. 195; *Hollister v. Barkley*, 9 N. Hamp. 230; *Village of Seneca Falls v. Matthews*, 9 Paige, 504. See *Orr v. Merrill*, 1 Wood. & Minot, 376.

The general rule, however, is that when the answer fully denies the facts on which the plaintiff's equity rests, the injunction will be dissolved. *Reid v. Gifford*, 1 Hopk. 416; *Gibson v. Tilton*, 1 Bland, 355; *Hollister v. Barkley*, 9 N. Hamp. 230-238; *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio Railroad Co.* 4 Gill & John. 7; *Moore v. Reed*, 1 Ired. Eq. 418; *Livingston v. Livingston*, 4 Paige, 111; *Wakeman v. Gillespy*, 5 Paige, 112; *McFarland v. McDowell*, 1 Car. Law Repos. 110; *Williams v. Berry*, 3 Stew. & Port. 251; *Christmas v. Campbell*, 1 Hayw. 123; *Thompson v. Allen*, 2 Hayw. 151; *Parkinson v. Trousdale*, 3 Scam. 370; *Orr v. Littlefield*, 1 Wood. & Minot, 18; *Alexander v. Markham*, 25 Georgia, 148; *Leigh v. Clark*, 3 Stockt. (N. J.) 113; *Scott v. Ames*, ib. 261; *Fowler v. Roe*, ib. 367; *Wooden v. Wooden*, 2 Green Ch. 429; *Merwin v. Smith*, 1 Green

ment of important facts, it will be dissolved without regard to the merits.<sup>1</sup>

Ch. 182. Not, however, unless the denial is positive. *Ward v. Van Bokkelen*, 1 Paige, 100; *Noble v. Wilson*, 1 Paige, 164; *Orr v. Littlefield*, 1 Wood. & Minot, 19; *Wakeman v. Gillespy*, 5 Paige, 112; *Roberts v. Anderson*, 2 John Ch. 204; *Hollister v. Barkley*, *ubi supra*. A denial from information and belief is not sufficient. *Apthorpe v. Comstock*, 1 Hopk. 148; *Ward v. Van Bokkelen*, *supra*; *Poor v. Carleton*, 3 Sumner, 78; *Fulton Bank v. New York & Sharon Canal Co.* 1 Paige, 311; *U. States v. Parrott*, 1 McAll. C. C. (Cal.) 271; *Holmes v. George*, 24 Georgia, 636. Nor is an evasive answer sufficient. *Williams v. Hall*, 1 Bland, 195; nor a contradictory answer, *Tong v. Oliver*, 1 Bland, 199; nor is the answer sufficient for this purpose, if there be an extreme improbability in the defendant's statements. *Moore v. Hylton*, 1 Dev. Eq. 429. Where the equity of an injunction bill is not charged to be within the knowledge of the defendant, and the defendant merely denies all knowledge and belief of the facts alleged therein, the injunction will not be dissolved on the bill and answer alone. *Rodgers v. Rodgers*, 1 Paige, 426; *Quackenbush v. Van Riper*, 1 Saxton (N. J.) 476. And it is always a good answer to an application to dissolve an injunction upon bill and answer, that the equity of the bill upon which the injunction rests, is not denied by the defendant, although no exceptions have been filed. *Wakeman v. Gillespy*, 5 Paige, 112; *Yonge v. McCormick*, 6 Florida, 646. The answer is sufficient, however, if it disprove the facts stated in the bill. *M'Farland v. M'Dowell*, 1 Car. Law Repos. 110. The defendant need only show that the evidence of the plaintiff is entitled to no credit. *North v. Perrow*, 4 Rand. 1. The answer must be sworn to if the defendant wishes to move to dissolve an injunction upon the bill and answer. *Doughrey v. Topping*, 4 Paige, 94; and this, though the oath is waived, or is otherwise unnecessary, *ib.*; *Manchester v. Day*, 6 Paige, 295; *Rainey v. Rainey*, 35 Alabama, 282. But an injunction is not dissolved of course, even upon a full denial of the equity of the bill, if the Court can see in the facts disclosed good reasons for retaining it. *Bank of Monroe v. Schermerhorn*, 1 Clarke, 303; *Hollister v. Barkley*, *ubi supra*; *Shellman v. Scott*, R. M. Charl't. 380, 381; *Sherrill v. Harrell*, 1 Ired. Eq. 194; *Chetwood v. Brittan*, 1 Green Ch. 439; *Orr v. Littlefield*, 1 Wood. & Minot. 19, 20; *Roberts v. Anderson*, 2 John. Ch. 202; *Linton v. Denham*, 6 Florida, 1533; *Allen v. Hawley*, 6 Florida, 142; *Carter v. Bennett*, 6 Florida, 214. In *Poor v. Carleton*, 3 Sumner, 75, 76, Mr. Justice Story remarks, "I confess I should be sorry to find, that any such practice had been established, as that a special injunction should, at all events, be dissolved upon the mere denial by the answer of the whole merits of the bill. There are many cases in which such a practice would be most mischievous; nay, might be the cause of irreparable mischief. The true rule seems to me to be, that the question of the dissolution of a special injunction is one which, after the answer comes in, is addressed to the sound discretion of the Court." "Extraordinary circumstances may exist, which will not only justify, but demand the continuation of the special injunction." "I am not satisfied, that the authorities do establish a contrary doc-

<sup>1</sup> *Simson v. Davis*, 12 Sim. 46. See *Endicott v. Mathis*, 1 Stockt. (N. J.) 110.

## CHAPTER XXXIX.

### WRITS AND ORDERS IN THE NATURE OF INJUNCTIONS.

#### SECTION I. — *Restraining Orders under Stat. 5 Vict. c. 5.*

THE last chapter having been devoted to the consideration of such writs of injunction as the Court of Chancery issues under its original and inherent jurisdiction, — we shall now proceed in this chapter to investigate the practice concerning certain orders and writs of a similar effect issued under a jurisdiction conferred by Act of Parliament. These are, first, an order restraining the transfer of stock or shares under stat. 5 Vict. c. 5, s. 4.

Secondly, the writ of *distringas*, which the Court of Chancery is now authorized to issue by the 5th section of the same Act.

It will also be convenient to include in this chapter a statement of the doctrine. If they did, I should hesitate to follow them in a mere matter of practice, subversive of the very ends of justice." See *Moredock v. Williams*, 1 Tenn. 325; *Hollister v. Barkley*, *ubi supra*; *Shellman v. Scott*, R. M. Charl. 380, 381; *Parkinson v. Trousdale*, 3 Scam. 370. An injunction will not be dissolved, as a matter of course, on the carrying in of the answer, denying the equity of the bill, if the plaintiff has adduced auxiliary evidence of his right. *Orr v. Littlefield*, 1 Wood. & Minot. 13.

Where any material allegation of an injunction bill remains unanswered, the injunction will not be dissolved. *Jackson v. Jones*, 25 Georgia, 93; *Wooten v. Smith*, 27 Georgia, 216; *Lawrence v. Philpot*, 27 Georgia, 585; *Thomas v. Horn*, 24 Georgia, 481; *Brown v. Stewart*, 1 Maryl. Ch. Dec. 87; *Washington University v. Green*, 1 Maryl. Ch. Dec. 97.

In New Jersey, on a motion to dissolve an injunction for want of equity in the bill, or because the equity is answered, affidavits cannot be read in opposition to it. *Brown v. Winans*, 3 Stockt. (N. J.) 267; *Merwin v. Smith*, 1 Green Ch. 182. Where the motion is based upon other grounds they may be read. *Brown v. Winans*, *supra*. So that, where an answer has been filed, and on a motion to dissolve an injunction, the defendant relies upon anything except the want of equity in the bill and upon his answer, he must specify, in his notice, the grounds upon which he relies for a dissolution, in order that the other party may be heard on affidavits. *Brown v. Winans*, *supra*.

By Chancery Rule 9, § 4, in New Jersey, where a motion is made to dissolve an injunction upon the answer, the defendant shall rely on his answer, and on the affidavits annexed thereto, in reply to affidavits annexed to the bill; and no affidavits, except those annexed to the bill, shall be read on such motion on behalf of the plaintiffs, except in reply to new matter set up in the answer, and upon which the defendant shall in any manner rely for a dissolution of the injunction.

of the practice concerning stop orders which are not made under Act of Parliament; indeed, as they apply to funds over which the Court has previous control, they only derive their authority from being orders in the causes to which the funds affected by them belong.

By stat. 40 Geo. III. c. 36, Courts of Equity are enabled to make orders either directing the transfer of stock, or restraining the Bank of England from suffering a transfer, although the Governor and Company of the Bank are not parties to the cause in which the order is made. This statute, in many cases, prevents the necessity of making the Bank a party to a cause where part of the relief sought by the bill is to obtain a transfer of stock, or to prevent a defendant from obtaining such a transfer contrary to the rights of the plaintiff.

The object of this statute, however, is only in certain circumstances to prevent the necessity of making the Bank a party to a cause.

It does not provide any summary means of preventing a transfer, nor does it, when a cause has been regularly instituted, enable the plaintiff to apply for an injunction against the Bank otherwise than upon notice to the defendant, or in case of emergency upon such affidavits as would be sufficient to enable the plaintiff to obtain a special injunction against the defendant.<sup>1</sup>

The privilege of obtaining orders directing or restraining the transfer of stock without making the corporation a party to the suit, applied only to government stock and the Bank of England. It did not extend to shares and interests in other public companies, whether incorporated or not. Moreover it was found that, even with respect to government stock, neither the remedy given by the above-mentioned Act, nor that afforded by the old writ of *distringas* issued out of the Court of Exchequer, was sufficient to prevent injuries arising from the facility with which stock was transferred from one person to another. For these reasons, by the 4th section of 5 Vict. it is enacted, "That, on and after the fifteenth day of October, 1841, it shall be lawful for the Court of Chancery, upon the application of any party interested by motion or petition in a summary way without bill filed, to restrain the Governor and Company of the Bank of England, or any other public company, whether incorporated or not, from permitting the

<sup>1</sup> *Maundrell v. Maundrell*, 6 Ves. 773, n.; *Doolittle v. Walton*, 2 Dick. 442.

transfer of any stock in the public funds or any stock or shares in any public company which may be standing in the name or names of any person or persons or body politic or corporate in the books of the Governor and Company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon, and every order of the said Court of Chancery upon such motion or petition as aforesaid shall specify the amount of the stock or the particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate in which the same shall be standing, provided always that the said Court of Chancery shall have full power upon the application of any party interested to discharge or vary such order, and to award such costs upon such application as to the said Court shall seem fit."

Under this section, a party is now enabled, without a suit being instituted, or a bill being filed, by motion or petition in a summary manner, to obtain an order restraining the transfer of stock in any public company. Upon an application of this nature, it is clear that the Court must be satisfied by affidavit that there is a necessity for such an intervention. There have not, however, as yet been many cases to determine what evidence will be deemed sufficient.

In the case of *Ex parte Field*,<sup>1</sup> Sir J. L. Knight Bruce, V. C., declined to make such an order upon an affidavit of the petitioner, which was to the effect that the deponent had been informed and believed that it was the intention of the trustee to sell out the stock and leave the country.

The effect of such an order, when obtained, seems to be the same as that of an *injunction*, and it continues in force until discharged by order of Court. But the Act does not confer upon the Court of Chancery any new and summary jurisdiction to adjudicate upon disputed rights without a bill filed.<sup>2</sup>

When a restraining order has been issued, this Court has, by the terms of the Act, full power upon the application of any parties interested, to discharge or vary it, and the Court will be guided in the exercise of the discretion with which it is intrusted, not merely by the statements contained in the answer, but also by

<sup>1</sup> Y. & C. 2, and see *In re Marquis of Hertford*, 1 Hare, 584, for an affidavit which was considered sufficient.

<sup>2</sup> *In re Marquis of Hertford*, Hare, 584.

the affidavits filed, as well in opposition to the answer as in support of it.”<sup>1</sup>

The petition for an order of this description should be intituled in the Act of Parliament, and also in the name of the person on whose behalf it is presented. It should state the circumstances on which the petitioner relies to induce the Court to grant the required order.

In the Marquis of Hertford’s case, the petition prayed that a *writ* of injunction might issue. And the order made upon the petition was, “That an injunction be awarded to restrain the Governor and Company of the Bank of England from transferring the sum of 4,000*l.* bank annuities standing in their books in the name of Nicholas Suisse, until the further order of the Court, the party applying undertaking to serve the said Nicholas Suisse with notice of the injunction within twenty-four hours from the date hereof.”

From this case, it might be inferred that the practice would be under this section of the Act to issue a writ of injunction under seal; but upon reference to the terms of the Act, it seems that it would be more correct, instead of a writ being issued, for the Court merely to make an order specifying the amount of the stock or the particular shares to be affected, and restraining the Bank of England or the public Company in the books of which the stock or shares are standing from transferring the same.

As we have before seen<sup>2</sup> that the writ of execution is now abolished, there does not seem to be any very material difference in the manner in which the restraining order will be enforced in consequence of its not being under seal. It is presumed that, after service of the order itself, obedience will be enforced in the same manner as we have before seen in the case of an injunction.

<sup>1</sup> Lord Lyndhurst, 1 Ph. 203, S. C.

<sup>2</sup> Ante, p. 1058.

## SECTION II.

*The Writ of Distringas.*

HAVING now stated the practice with respect to the statutory restraining order authorized by the 4th section of the 5th Vict. c. 5, the next subject of investigation is the writ of *distringas*.<sup>1</sup> This remedy is not one of recent adoption. Previously to the passing of the above-mentioned Act, where a transfer of stock, or payment of dividends, was sought to be immediately restrained, the mode of proceeding was to obtain a *distringas* from the Court of Exchequer against the Bank, and to serve it upon the secretary of the Bank of England, accompanied by a notice that the object of the *distringas* was to prevent the transfer of the stock, or payment of the dividends as described in the notice. The statute 5 Vict. c. 5, which abolished the equitable jurisdiction of the Court of Exchequer, has conferred upon the Court of Chancery the power to issue the same writ, for, by section 5, it is enacted, "That in the place and stead of the writ of *distringas*, as the same has been heretofore issued from the said Court of Exchequer, a writ of *distringas* in the form set out in the first schedule to the Act shall, on and after the said fifteenth day of October, 1841, be issuable from the Court of Chancery, and shall be sealed at the Subpœna Office; and that the force and effect of such writ, and the practice under or relating to the same, shall be such as is now in force in the said Court of Exchequer."

In order to obtain a writ of this description, all that is necessary is that the person applying for it, or his solicitor, should be able to make an affidavit in the following form, which is prescribed by the 2d Order of 10th December, 1841:—

A. B. (*the name of the party in whose behalf the writ is sued out*) v. The Governor and Company of the Bank of England.

I, \_\_\_\_\_ of \_\_\_\_\_ do solemnly swear that, according to the best of my knowledge, information, and belief, I am (*or, if the affidavit is made by the solicitor, A. B. of \_\_\_\_\_ is*) beneficially interested in the stock hereinafter particularly described, that is to say (*here specify the amount of the stock to be affected*

<sup>1</sup> See Angell & Ames Corp. (6th ed.) 667 *et seq.*; 1 Grant Ch. Pr. 95; Jones v. Boston Mill Corporation, 4 Pick. 511; Holland v. Cruft, 20 Pick. 321; Grew v. Breed, 12 Met. 363; Orange Co. Bank v. Worden, 1 Wend. 309.

*by the writ, and the name or names of the person or persons or body politic or corporate in whose name or names the same shall be standing.)*

The writ itself is prepared by the solicitor of the applicant in the form prescribed by the Act of Parliament, as follows : —

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriffs of London, greeting. We command you that you omit not by reason of any liberty, but that you enter the same and distrain the Governor and Company of the Bank of England, by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermeddle therewith until we otherwise command you : and that you answer us the issues of the said lands so that they do appear before us in our High Court of Chancery on the       day of       to answer a certain bill of complaint lately exhibited against them and other defendants, before us in our said Court of Chancery, by       complainant ; and further to do and receive what our said Court shall then and there order in the premises, and that you then leave them this writ.

Witness ourself at Westminster this       day of  
in the       year of our reign.

DEVON.

The writ and affidavit having been prepared in the manner above stated, the next step is to have the writ duly sealed. For this purpose the 1st Order of the 17th of November, 1841, directs, “ That any person or persons claiming to be interested in any stock transferable at the Bank of England, standing in the name or names of any other person or persons or body politic or corporate in the books of the Governor and Company of the Bank of England, may, by his or their solicitor, prepare a writ of distringas pursuant to the said Act in the form set out in the first schedule to the said Act, and may present the same for sealing at the Subpoena Office.”

And by the 2d of the same Orders it is directed, “ That upon the presentment of such writ for sealing, and on leaving with the patentee of the Subpoena Office an affidavit duly sworn by the person or one of the persons applying for such writ, or his solicitor, before one of the Masters or Masters extraordinary of this Court, in the form set out at the foot of those Orders, the same writ shall

(in conformity with the Orders of this Court for issuing and sealing writs of *subpœna*) be forthwith sealed with the seal of the Subpœna Office; and such writ, when sealed, shall have the same force and validity as the writ of *distringas* heretofore issued out of the Court of Exchequer."

The next subject of consideration is the effect of such a writ after it is obtained. It will be recollected that the Act directs, that "The force and effect of such writ, and the practice under or relating to the same, shall be such as is now in force in the Court of Exchequer"; subject, however, to any order thereafter to be made in Chancery upon the subject. The effect of the writ in the Court of Exchequer was thus stated by Lord Lyndhurst in *Ex parte Amyot*.<sup>1</sup> "The writ of *distringas* was granted under the old practice, and this afforded an opportunity of instituting a suit for relief, the property being secured in the mean time. The practice was for the Bank, upon an application being made for a transfer, to give notice of it to the party who had obtained the writ; and unless a bill was filed, and an injunction obtained within a limited time, the benefit of the *distringas* was withdrawn."

The Orders in Chancery upon the subject do not seem to have materially varied this practice of the Court of Exchequer. By the 3d Order of 17th November, 1841, "Such writ of *distringas*, and all process thereunder, may at any time be discharged by the order of this Court, to be obtained as of course upon the petition of the party on whose behalf the writ was issued, and to be obtained upon the application, by motion or notice, or by petition duly served, of any other person claiming to be interested in the stock sought to be affected by such writ; and that upon or after such application, such costs thereof and in relation thereto, and to the said writ, as to this Court shall seem just, may, if this Court shall think fit, be awarded and ordered to be paid by the person or persons who obtained such *distringas*, or upon an application by any other person or persons, by such person or persons."

By the 4th Order, "The Governor and Company of the Bank of England, having been served with such writ of *distringas*, and a notice not to permit the transfer of the stock in such notice and in the said affidavit specified, or not to pay the dividends thereon, and having afterwards received a request from the party or parties

<sup>1</sup> 1 Ph. 130 (n).

in whose name or names such stock shall be standing, or some person on his or their behalf, or representing him or them, to allow such transfer or to pay such dividends, shall not, by force or in consequence of such *distringas*, be authorized without the order of this Court to refuse to permit such transfer to be made, or to withhold payment of such dividends, for more than eight days after the date of such request."

It remains now only to be stated, that the fact of a person having sued out the writ of *distringas* does not preclude him from subsequently presenting a petition for a restraining order under the fourth section of the Act.<sup>1</sup> Indeed, as we have seen, the effect of the writ of *distringas* is only temporary; if the person who obtains it wishes to continue the restraint upon the transfer, he must either obtain a restraining order under the fourth section, or, by filing a bill against the party interested in the fund, obtain a regular injunction against the Bank under the stat. 40 Geo. III. c. 36.

By the 5th of the same Orders, it is directed, "That, upon leaving such affidavit as aforesaid with the patentee of the Subpœna Office, there shall be paid to such patentee the sum of one shilling for filing such affidavit, and that within twenty-four hours from the time when such affidavit shall be so left, the said patentee shall pay the said sum of one shilling to the Clerk of the Affidavits, and cause such affidavit to be filed and registered at the office of such Clerk."

By the 6th Order, upon the sealing of such writ of *distringas* the sum of five shillings and sixpence shall be paid to the patentee of the Subpœna Office, and that out of such sum the said patentee shall pay the sum of four shillings to the Accountant-General, to be by him placed to the credit of the account, entitled "the Suitors' Fee Fund Account."

The 7th Order directs, that "For and in respect of the preparation and service of such writ of *distringas*, and the *præcipe* and attendance in respect thereof, such costs shall be allowed as by the rules and practice of this Court are allowed for the preparation and service and attendance in respect of a writ of *subpœna* to answer a bill."

<sup>1</sup> 1 Ph. 132.

## SECTION III.

*Stop Orders.*

THE writs and orders hitherto considered in this Chapter apply to government stocks and shares in public companies, but they do not extend to funds in Court standing in the name of the Accountant-General.

With respect to funds of this description, whether they are standing to the general credit of a cause, or whether they have been carried over to any particular account, the Court, in its own jurisdiction, without any statutory authority, has always exercised the power of issuing what are called Stop Orders. Any person, although not a party to the cause in which the fund is standing, who has become interested in or entitled to any such fund, or to any share thereof, may apply by petition to that Court to which the cause is attached, for an order preventing the payment of the fund in question without notice to the applicant.<sup>1</sup> Since the 15 & 16 Vict. c. 86, the application should be made by summons in chambers if the assignor concurs, but not otherwise.

The petition for this purpose must show generally the title of the assignor, although it is not absolutely necessary that it should show the particular share of the fund to which he was entitled.

Secondly, it must show the assignment to the petitioner.<sup>2</sup> These facts should not only be stated in the petition, but the Court must have proof that they are truly stated. The former, namely, the title of the assignor, will usually appear from the proceedings and records in the cause; where this is not the case, it must be established by affidavit.<sup>3</sup> The latter, namely, the assignment to the petitioner, is generally proved by the assignor either joining in the petition, or appearing and admitting it; when this is not the case, the assignment must be proved in the regular way.<sup>4</sup> To obviate the expense of strictly proving the deed, it is not unusual for the assignment to give the assignee power to use the name of the assignor as a co-petitioner.

<sup>1</sup> *Hook v. Roberts*, 12 Jur. 108. Such an order was made on the application of the assignee of the interest of the sole next of kin of a lunatic. *In re Moore*, 1 Mac. & Gor. 103; *In re Piggott*, 8 Mac. & Gor. 268.

<sup>2</sup> *Wood v. Vincent*, 4 Beav. 419.

<sup>3</sup> *Quarman v. Williams*, 5 Beav. 183.

<sup>4</sup> *Wood v. Vincent*, *ubi supra*; *Winchelsea v. Garrety*, 1 Beav. 223.

It was formerly necessary, upon applications for stop orders, that the petitioner should give notice to all the persons interested in the fund ; for as there was no provision enabling the Court to make the person applying pay the costs consequent upon the order, it was considered unjust that a person should obtain an order affecting another party's fund in his absence.<sup>1</sup> To prevent the necessity of serving so many persons upon a petition of this kind, a General Order was issued on the 3d of April, 1841, which directs, "That in all cases where any stocks or funds are or shall be standing in the name of the Accountant-General of the Court to the general credit of any cause, or to the account of any class or classes of persons, and an order shall be made to prevent the transfer or payment of such stocks or funds, or any part thereof, without notice to the assignee of any person or persons entitled in expectancy or otherwise to any share or portion of such stocks or funds, the person or persons by whom any such order shall be obtained, or the shares of such stocks or funds affected by such order, shall, at the discretion of the Court, be liable to pay any costs, charges and expenses, which, by reason of any such order having been obtained, shall be occasioned to any party to the cause, or any person interested in any such stocks or funds ; and henceforward, any person presenting a petition for any such order as aforesaid shall not be required to serve such petition upon the parties to the cause, or upon the persons interested in parts of the stocks or funds not sought to be affected by any such order."

This Order, although it dispenses with the necessity of persons being served with the petition merely because they are interested in the fund, or parties to the cause, yet does not do away with the necessity of the assignment being proved, so that the assignor must still be served with a petition presented by the assignee alone.<sup>2</sup> The order as now drawn up by the registrars is prefaced by a submission on the part of the assignee, to be bound by the General Order of 1841.<sup>3</sup>

. When the order has been passed and entered, it must be delivered at the Accountant-General's office. The effect of it is, that the fund to which it applies cannot be paid until either it is directly discharged, or until some order is made expressly directing pay-

<sup>1</sup> *Day v. Croft*, 4 Beav. 34 ; *Trezevant v. Frazer*, 3 Beav. 283.

<sup>2</sup> *Parsons v. Groome*, 4 Beav. 521.

<sup>3</sup> 2 Beav. xi.

ment notwithstanding the previous stop order. A party who has obtained a stop order may appear at the hearing of the cause for further directions, or upon a petition being presented for payment of the fund to the party in the cause who claims it. The Court can then either discharge the stop order, or direct payment to the person who has obtained it, according to what appear to be the rights of the parties.

We have before seen,<sup>1</sup> that a judgment creditor is enabled, under the 1 & 2 Vict. c. 110, s. 14, to obtain from a Judge of one of the Superior Courts an order charging government stock or shares of public companies belonging to the debtor. It has been determined, that this order can only be made by a Judge at Common Law, and not by a Judge in Equity;<sup>2</sup> but this seems at variance with the cases cited below.<sup>3</sup> At first some doubt was entertained whether such an order could be made as to funds standing in the name of the Accountant-General. A second Act, 3 & 4 Vict. c. 82, has made it clear that such funds may be so charged. When a charging order of this kind has been made, a Court of Equity will direct a stop order as auxiliary to such a charge;<sup>4</sup> and notice to the Accountant-General of an assignment of funds in his hands is of no avail against a stop order afterwards obtained by a subsequent purchaser without notice.<sup>5</sup> And even where such a charging order had not been made, but where the creditor had caused a writ of *fieri facias* to issue, the Court has stopped, at the instance of the creditor, payment of funds in Court to the debtor.<sup>6</sup> It seems also that where a judgment creditor has obtained a charging order under the statute, he may sustain a suit for the immediate protection of the interest he has acquired by his judgment, notwithstanding the six months mentioned in the statute have not expired.<sup>7</sup> He cannot, however, upon petition, obtain payment of the fund to which the order has been applied, although the Court will grant him a stop order.<sup>8</sup> It appears that an equitable assign-

<sup>1</sup> Ante, p. 1052.

<sup>2</sup> *Hulkes v. Day*, 10 Sim. 41.

<sup>3</sup> *Stanley v. Bond*, 7 Beav. 386; *Westby v. Westby*, 5 De G. & Sm. 516.

<sup>4</sup> *Hulkes v. Day*, *ubi supra*; *Watts v. Jefferyes*, 3 Mac. & Gor. 372.

<sup>5</sup> *Warburton v. Hill*, Kay, 470, in which case much information will be found on the subject of charging and stop orders generally.

<sup>6</sup> *Robinson v. Wood*, 5 Beav. 388.

<sup>7</sup> *Bristed v. Wilkins*, 3 Hare, 235; *Reece v. Taylor*, 5 De G. & Sm. 480.

<sup>8</sup> *Whitfield v. Prickett*, 13 Sim. 259; *Watts v. Jefferyes*, 3 M. & G. 372.

ment of a trust fund completed by notice to the trustees, will have priority over a judgment-creditor of the assignor, who, subsequently to the assignment and after the fund had been paid into Court, has obtained a charging order.<sup>1</sup>

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## CHAPTER XL.

### OF THE WRIT OF NE EXEAT REGNO.<sup>2</sup>

#### SECTION I. — *In what Cases issued.*<sup>3</sup>

A *Ne exeat Regno* is a writ which issues to restrain a person from going out of the kingdom, without the king's license or the leave of this Court. It is a high prerogative writ, which was originally applicable to purposes of state only, but was afterwards extended to private transactions.<sup>4</sup>

“It is mostly used where a suit is commenced in this Court against a man, and he, designing to defeat the other of his just demand, or to avoid the justice and equity of this Court, is about to go beyond sea, so that the duty will be endangered if he goes.”<sup>5</sup>

<sup>1</sup> Brearcliff v. Dorrington, 4 De G. & Sm. 122; and see as to real estate, Lane v. Jackson, 20 Beav. 535.

<sup>2</sup> For the history and uses of this writ, see 2 Story Eq. Jur. § 1465 to § 1475. For form of order for writ to issue, see 2 Seton Dec. (3 Eng. ed.) 959.

<sup>3</sup> For cases showing under what circumstances this writ will be granted in different States, see 1 Smith Ch. Pr. (2d Am. ed.) 577, note (a); *Virginia*, Rhodes v. Cousins, 6 Rand. 188; *Alabama*, Lucas v. Hickman, 2 Stew. 11; *North Carolina*, Edwards v. Massey, 1 Hawks, 359; *South Carolina*, Nickson v. Richardson, 4 Desaus. 108; *DeCarriere v. DeCalonne*, 4 Sumner's Vesey, 478, note (a), by Mr. Sumner, and for the *English* cases see Mr. Hovenden's note, ib. 592. *New York*. The writ of *ne exeat* is not abolished by the New York Code of Procedure, as a provisional remedy. *Forrest v. Forrest*, 10 Barb. Sup. Ct. 46. Nor is the power of the Supreme Court to issue the writ impaired or affected by the provisions of the Code. *Bushnell v. Bushnell*, 15 Barb. 399.

<sup>4</sup> Jackson v. Petrie, 10 Ves. 164.

<sup>5</sup> Prac. Reg. 289. This writ has now become an ordinary process of Courts of Equity; and it is as much a writ of right as any other process used in the administration of justice. It must be granted when a proper case is presented. *Gleason v. Bisby*, 1 Clarke, 551; *Gibert v. Colt*, 1 Hopk. 499; *Mitchell v. Bunch*, 2 Paige, 606; *Porter v. Spencer*, 2 John. Ch. 169; *Rice v. Hale*, 5 Cush. 242. It is resorted to merely for the purpose of obtaining equitable bail. *Mitchell v.*

A *ne exeat regno* issues only where the claim upon the party going abroad is equitable, and it has never been granted upon a mere demand at Law for money; "for there," the old practice was, "the defendant may be arrested, and obliged to give bail, who will be liable, unless they surrender him, and he may be as easily taken by that process as on a *ne exeat regno*." <sup>1</sup>

Bunch, *ubi supra*. Whenever the defendant intends leaving the State, the plaintiff, upon producing evidence of such intention, and of his equitable claims against the defendant, has a right to this equitable bail. *Ib.* The only proper use of this writ is to detain the person of the defendant to respond to the decree of the Court; and when the cause of action is such, that the *person* of the defendant cannot be touched under the decree, either by execution or attachment, the writ will not issue. *Gleason v. Bisby*, 1 Clarke, 551. See *Johnson v. Clendenin*, 5 Gill & John. 463. In *Rice v. Hale*, 5 Cush. 244, Shaw C. J. said, "It is a mistake to suppose, that to obtain security of the debt is the only reason why the writ should issue. It cannot issue unless a debt is due, but having issued, the defendant will be held to comply with the decree of the Court and the justice of the case. *Johnson v. Clendenin*, 5 Gill & John. 463; 2 Story Eq. Jur. § 1473; *Atkinson v. Leonard*, 3 Bro. C. C. 218. He may thus be compelled to make a confession, to execute releases and discharges, and to do many things in the progress of the cause, from the benefit of which the plaintiffs will be debarred if he is discharged on this" [the poor debtor's] "oath."

<sup>1</sup> Per Lord Hardwicke, in *Pearne v. Lisle*, Amb. 75; see, also, *Brocker v. Hamilton*, 1 Dick. 154; *Grimes v. Stritho*, 2 Dick. 469; *Ex parte Duncombe*, 2 Dick. 503; *Crosley v. Marriott*, *ibid.* 609; *Ex parte Bruncker*, 3 P. Wms. 314; *Anon.* 2 Atk. 210; *S. C. sub nom. King v. Smith*, 1 Dick. 82; *Anon.* 1 Bro. C. C. 376; *Atkinson v. Leonard*, 3 Bro. C. C. 218; *Hannahan v. Nichols*, 17 Georgia, 77. The writ of *ne exeat* will not in general be granted, except in cases of equitable debts or claims not recoverable at Law. *Atkinson v. Leonard*, 3 Bro. C. C. (Perkin's ed.) 223, note (a); 2 Story Eq. Jur. § 1740 *et seq.*; *Seymour v. Hazard*, 1 John. Ch. 1; *Smedburg v. Mark*, 6 John. Ch. 138; *Porter v. Spencer*, 2 John. Ch. 169, 170; *Mitchell v. Bunch*, 2 Paige, 606; *Brown v. Haff*, 5 Paige, 235; *De Rivafrinoli v. Corsetti*, 4 Paige, 264; *Nixon v. Richardson*, 4 Desaus. 108; *Cox v. Scott*, 5 Har. & John. 384; *Palmer v. Van Doren*, 2 Edw. Ch. 425; *Gleason v. Bisby*, 1 Clarke, 551; *Rhodes v. Cousins*, 6 Rand. 188; *Lucas v. Hickman*, 2 Stew. 11; *Rice v. Hale*, 5 Cush. 241. In North Carolina the rule of granting a *ne exeat* only in cases of equitable demands, applies where money, not property, is the subject in controversy. *Edwards v. Massey*, 1 Hawks, 352. The exceptions to this rule, that this writ lies only in cases of equitable demands, as stated by Mr. Justice Story, are — 1st, alimony; 2d, cases of account. 2 Story Eq. Jur. § 1471 – 1473. See *Atkinson v. Leonard*, 3 Bro. C. C. (Perkins's ed.) 223, note (a). In these two cases, Courts of Law and of Equity have concurrent jurisdiction. *Atkinson v. Leonard*, *ubi supra*; *Rhodes v. Cousins*, 6 Rand. 188; *Mitchell v. Bunch*, 2 Paige, 606; *Nixon v. Richardson*, 4 Desaus. 108. The act to abolish imprisonment for debt in New York has not deprived the Court of Chancery of the power to issue a writ of *ne exeat*,

The only exception to the rule, which requires the demand to be equitable, is in the instance of *alimony* decreed by the Spiritual Court, in which case, as the Spiritual Court never could take bail, this Court has lent its assistance to the woman.<sup>1</sup>

It is, however, only where there has been an actual decree for alimony that this Court will issue the writ, and it has refused to do so upon the mere allegation that the plaintiff was suing her husband in the Ecclesiastical Court, if she had not obtained a decree;<sup>2</sup> and it seems that, even where there has been a decree for alimony, the writ will not issue pending an appeal from it by the husband.<sup>3</sup> Nor will it be issued for *interim* alimony, granted *pendente lite*, before a decree;<sup>4</sup> nor for any other sum than that which is actually due for the alimony and costs.<sup>5</sup>

With reference to what will be considered as such an equitable demand as may be the foundation for a *ne exeat regno*, it is to be noticed, that, wherever a party has a claim against another, which he can only enforce in a Court of Equity, the Court will issue the writ; therefore, where a man had executed a bond to the trustees of his marriage settlement, a party, beneficially interested in the money secured by it, was allowed to have a *ne exeat regno* against the obligor.<sup>6</sup> The same principle was afterwards acted upon by Lord Eldon, in *Grant v. Grant*.<sup>7</sup> It is, however, to be observed, that, in a case where a bill was filed by a residuary legatee against in cases of equitable cognizance, where such writ would have been allowed previous to the passage of that act. *Brown v. Haff*, 5 Paige, 235. See *Ashworth v. Wrigley*, 1 Paige, 301. As to the demands on which this writ is granted see *DeCarriere v. DeCalonne*, 4 Sumner's Vesey, 577, 592, Mr. Hovenden's notes; *Atkinson v. Leonard*, 3 Bro. C. C. (Perkins's ed.) 218 to 224, notes; *Russell v. Ashby*, 5 Sumner's Vesey, 98, note (a).

<sup>1</sup> *Pearne v. Lisle*, Amb. 75; *Smithson's Case*, 2 Vent. 345; *Read v. Read*, 1 Ch. Ca. 115; *Anon.* 2 Atk. 210; *Ex parte Whitmore*, 1 Dick. 143; *Head v. Head*, 3 Atk. 295; *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, *ibid.* 173; *Haffey v. Haffey*, 14 Ves. 261.

<sup>2</sup> *Shaftoe v. Shaftoe*, 7 Ves. 171; *Coglar v. Coglar*, 1 Ves. jr. 95. But in New York, a writ of *ne exeat* may be granted prior to any decree for alimony. *Denton v. Denton*, 1 John. Ch. 364, 441. So in New Jersey, *Yule v. Yule*, 2 Stockt. Ch. (N. J.) 138.

<sup>3</sup> *Street v. Street*, 1 T. & R. 322.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Shaftoe v. Shaftoe*, *ubi supra*; *Dawson v. Dawson*, *ubi supra*; *Haffey v. Haffey*, *ubi supra*.

<sup>6</sup> *Leake v. Leake*, 1 J. & W. 605.

<sup>7</sup> 3 Russ. 599.

the executor and a debtor to the estate, stating that, by collusion between them, the defendant was suffered to remain unpaid, and that the debtor was about to leave the country, Lord Eldon refused the application for a *ne exeat regno*, saying he did not know any instance where it had been done.<sup>1</sup> It is to be recollected, that the foundation of the equity in this case was the collusion, alleged in the bill, between the executor and the debtor; the decision, therefore, was probably governed by the principle laid down by him in a case, mentioned by Mr. Beames in his Treatise upon the Writ of *Ne exeat Regno*,<sup>2</sup> in which the plaintiff filed his bill on the ground of fraud, stating a large balance to be due to him from the defendant; and the writ was refused by Lord Eldon, who said — “Here I am called upon to grant the writ in a case of alleged fraud, and that, by the fraudulent conduct of the defendant, such a sum will be due; this is going further than the Court ever has gone.”<sup>3</sup>

The Court has also refused to grant the writ to assist process of contempt, by which payment of costs is enforced,<sup>4</sup> although it has been granted for that purpose in Ireland.<sup>5</sup> It seems, however, that where, upon the taxation of a solicitor's bill, he appears to have been over-paid, the Court will grant a *ne exeat* to prevent his going abroad, and that without requiring a bill to be previously filed.<sup>6</sup>

It is to be observed, in this place, that, although the Court will not grant a *ne exeat regno* where the demand is at Law, it will not refuse it merely because the plaintiff might have relief at Law, if the case be one in which the Court of Chancery has a concurrent jurisdiction,<sup>7</sup> as in the case of a suit for an account.<sup>8</sup>

<sup>1</sup> *Graves v. Griffith*, 1 J. & W. 646.

<sup>2</sup> *Beames on Ne exeat*, p. 56.

<sup>3</sup> See also *Jackson v. Petrie*, 10 Ves. 165. [Sumner's ed. notes.]

<sup>4</sup> *Goodman v. Sayers*, 5 Mad. 471.

<sup>5</sup> *Stewart v. Stewart*, 1 B. & B. 73.

<sup>6</sup> *Loyd v. Cardy*, Prec. in Ch. 171; but see *Ex parte Brunker*, 3 P. Wms. 312.

<sup>7</sup> See *Lucas v. Hickman*, 2 Stew. 11.

<sup>8</sup> *Jones v. Alephsin*, 16 Ves. 470; and see *Jones v. Sampson*, 8 Ves. 593; *Russell v. Asby*, 5 Ves. 96, Sumner's ed. 98, note (a); *Amsinck v. Barklay*, 8 Ves. 597; *Hannay v. M'Entire*, 11 Ves. 55; *Howden v. Rogers*, 1 V. & B. 129; *Dick v. Swinton*, *ibid.* 371; 2 Story Eq. Jur. § 1471, 1473; *Atkinson v. Leonard*, 8 Bro. C. C. (Perkins's ed.) 223, note (a); *Rhodes v. Cousins*, 6 Rand. 188; *Mitchell v. Bunch*, 2 Paige, 606; *Nixon v. Richardson*, 4 Desaus. 108.

So also the Court will grant the writ upon a bill to recover the amount due upon a bond which has been lost, although, by the present practice of the Courts of Law, a plaintiff may now declare upon a lost bond, which he could not do formerly ; for the Court of Chancery does not consider, that the circumstance of a Court of Common Law having by an extension of its rules acquired a concurrent jurisdiction is sufficient to defeat its jurisdiction in Equity.<sup>1</sup>

The same principle will also extend to cases of specific performance, for although in such cases the vendor may have a right to proceed at Law for the recovery of his purchase-money, yet, as Equity has a concurrent jurisdiction in such matters, a *ne exeat* will be issued to restrain the vendor from going abroad till he has given security for the amount of his purchase-money.<sup>2</sup> It is to be observed, however, that there appears to have been some doubt whether, in cases of this description, the Court will grant the writ, before there has been some decree establishing the plaintiff's right to a specific performance ; at any rate the writ will not be granted unless the Court can make it out to be quite clear that there must be a specific performance.<sup>3</sup>

In a case before Lord Brougham, an attempt was made to extend the principle to a suit for the specific performance of a covenant to indemnify.<sup>4</sup>

The case was principally argued upon the question, whether a party entitled, by agreement, to satisfaction by way of damages for the non-performance of the agreement, can come into Equity to enforce that satisfaction ; and it appears that the right to such relief is extremely doubtful, and therefore, although where the equity is clear, but the facts are in dispute, the writ may be sus-

<sup>1</sup> Atkinson v. Leonard, 3 Bro. C. C. 218.

<sup>2</sup> Boehm v. Wood, T. & R. 332, 334 ; see, also, Raynes v. Wyse, 2 Mer. 472, and Goodwin v. Clarke, 2 Dick. 497 (which, however, appears not to have been rightly decided), see T. & R. 345.

<sup>3</sup> See Brown v. Haff, 5 Paige, 235. This writ will not be granted in a suit for a specific performance, unless the claim of the plaintiff is a demand for money. Gibbs v. Meraud, 2 Edw. Ch. 482. See Cowdin v. Cram, 3 Edw. Ch. 231 ; De Rivafrinoli v. Corsetti, 4 Paige, 264.

<sup>4</sup> Jenkins v. Parkinson, 2 M. & K. 5. To sustain this writ sufficient equity must appear on the face of the bill. Mere apprehension that the defendant will misapply funds in his hands, or abuse his trust, is not sufficient. Woodward v. Schatzell, 3 John. Ch. 412.

tained,<sup>1</sup> yet that where the equity is matter of grave doubt, the plaintiff, however specific his allegation may be, cannot, generally speaking, have the writ.

The Court has never been in the habit of granting the writ when the party had been arrested or held to bail at Law, or when he could be arrested ; but, on the other hand, it will not, after the writ has been discharged in Equity, interfere to direct the party to be discharged from a subsequent arrest at Law for the same demand, but will leave it to the Court of Law to determine whether, under the circumstances, the Common Law process ought to be made available.<sup>2</sup>

In order to authorize the issue of a *ne exeat regno*, the demand must not only be equitable, but it must be a pecuniary demand ;<sup>3</sup> therefore the Court has refused to grant the writ upon a bill to enforce an agreement by which the defendant had undertaken to give the plaintiff a bill of exchange as a security for a demand.<sup>4</sup>

And the demand must not only be pecuniary, but it must be actually due.<sup>5</sup> The writ will not be issued in respect of a contingent claim ; therefore where it was nothing more than the demand of a wife against her husband, by virtue of a marriage agreement, in which the defendant obliged himself to secure 1,700*l.* out of his estate, for his wife, as a provision, in case she survived him, Lord Hardwicke refused the application, as the contingency was

<sup>1</sup> In *Hampton v. Pool*, 28 Georgia, 514, it was held, that a person, holding a covenant of warranty, pending a suit against him for the premises, may have a *ne exeat* against his warrantor.

<sup>2</sup> *Walker v. Christian*, 7 Sim. 367.

<sup>3</sup> See *Gibbs v. Meraud*, 2 Edw. Ch. 482 ; *Cowdin v. Cram*, 3 Edw. Ch. 231 ; *De Rivafrinoli v. Corsetti*, 4 Paige, 264.

<sup>4</sup> *Blaydes v. Calvert*, 2 J. & W. 211.

<sup>5</sup> *Whitehouse v. Partridge*, 3 Swanst. 365, 377. The debt, for which this writ will be issued, must be certain in its nature, and actually payable and not contingent. 2 Story Eq. Jur. § 1474 ; *Sherman v. Sherman*, 3 Bro. C. C. (Perkins's ed.) 370, notes. It will not lie, therefore, where the demand is of a general unliquidated nature, or is in the nature of damages. 2 Story Eq. Jur. § 1474 ; *Gibbs v. Meraud*, 2 Edw. Ch. 482. There must be a debt existing at the time, and so far mature, that present payment or performance can rightfully be demanded. *Gleason v. Bisby*, 1 Clarke, 551 ; *Rhodes v. Cousins*, 6 Rand. 188 ; *Cox v. Scott*, 5 Harr. & John. 384 ; *De Rivafrinoli v. Corsetti*, 4 Paige, 264 ; *Seymour v. Hazard*, 1 John. Ch. 1 ; *Brown v. Haff*, 5 Paige, 235 ; 2 Story Eq. Jur. § 1474 ; *Porter v. Spencer*, 2 John. Ch. 169.

one which might never happen.<sup>1</sup> But even where the debt becoming due does not depend upon a contingency, but is certain though future, the writ cannot be granted. The fact is, that, to entitle the plaintiff to the writ, he must be in a situation either to swear positively that so much is actually due,<sup>2</sup> or in some other manner to point out to the Court the sum to be marked on the writ;<sup>3</sup> upon which principle it is, that, in cases of alimony, the writ has, as we have seen, been strictly confined to the arrears of alimony actually due, and costs.<sup>4</sup> The only exception to the rule, which requires that the plaintiff should be in a situation to swear positively that a certain sum of money is due, is in the case of a suit for an account, in which it will be sufficient, if the plaintiff can swear, that, *according to the best of his belief*, any particular sum, *at the least*, would be found justly due to him upon a balance, if the account were taken.<sup>5</sup>

This writ was originally applied to persons domiciled in this country, “but for a long course of years it has been settled, that,

<sup>1</sup> Anon. 1 Atk. 521; and see Lord Eldon’s observations in *Whitehouse v. Partridge*, 3 Swanst. 375.

<sup>2</sup> *Rico v. Gualtier*, 3 Atk. 501; Anon. 1 Bro. C. C. 376; *Shermam v. Shermam*, 3 Bro. C. C. 370, [Perkins’s ed. notes *a* & *b*]; see, also, *Butler v. Butler*, cited in *Beames on Ne ex.* p. 52.

<sup>3</sup> *Boehm v. Wood*, T. & R. 332.

<sup>4</sup> Ante, p. 1802.

<sup>5</sup> *Rico v. Gualtier*, *ubi supra*; *Butler v. Butler*, *ubi supra*; *Jackson v. Petrie*, 10 Ves. 165. The plaintiff, even in a matter of account, must swear positively to a debt or balance due to him, but he need swear only according to his belief as to the amount. *Thorne v. Halsey*, 7 John. Ch. 189. See *Gernoe v. Boccacine*, 2 Wash. C. C. 130; *Gibert v. Colt*, 1 Hopk. 600; *Denton v. Denton*, 1 John. Ch. 441. If the plaintiff swears that so much is due upon an account, without entering into any explanation, that is sufficient; but if he swears that so much is due, and then explains how it arises, and, in making out the account, it appears that such sum is not due, he cannot have the writ. *Flack v. Holme*, 1 Jac. & Walk. 407, 408.

In *Rice v. Hale*, 5 Cush. 241, Shaw C. J. said: “We think the writ is not grantable, when the account is open and unliquidated, although the plaintiff states in his affidavit that a certain sum is due. Such an allegation, although in terms the statement of a fact, that is, of the defendant’s actual indebtedness, must nevertheless be qualified by the subject-matter to which it relates; and where it relates to a long unliquidated account, or to facts which are future and contingent, it can amount to nothing more than a strong declaration of a confident expectation or belief, and is not a sufficient ground for issuing the writ, unless it is accompanied and supported by proper accounts or documents.”

if a man lives in Scotland<sup>1</sup> or Ireland,<sup>2</sup> or in our colonies,<sup>3</sup> or in other parts of our dominions, yet, if, being a debtor, he comes here, and the party who is his creditor can pledge his oath that he is such a debtor, if it is a legal debt, he may be held to bail, and if it is an equitable debt, this writ of *ne exeat regno* may issue against him, although he comes here for a particular purpose only, and intends to return immediately.<sup>4</sup>

Upon this principle the Court acted in *Atkinson v. Leonard*,<sup>5</sup> where it granted the writ at the instance of an inhabitant of one West India colony against an inhabitant of another, who was only here for a casual purpose. It is to be remarked that, in the above case, the debt was contracted in the colony, and might have been recovered in the Courts there, according to the law of this country which was then in force; and it appears clear that a writ of *ne exeat* may issue against any defendant whose residence is out of England, in respect of a debt contracted abroad and recoverable there.<sup>6</sup>

It seems also, that the writ will be granted where the plaintiff is an Englishman and the defendant a foreigner;<sup>7</sup> but whether it can be granted where the plaintiff and defendant are both foreigners and the debt was contracted in their own country, appears to be doubtful;<sup>8</sup> although if the question is between two foreigners, but the subject-matter has arisen in this country, the writ will be granted.<sup>9</sup>

<sup>1</sup> *Mackintosh v. Ogilvie*, 1 Dick. 119; *Done's Case*, 1 P. Wms. 263. As to the form of the recognizance in such case, see post.

<sup>2</sup> *Howden v. Rogers*, 1 V. & B. 129; but see *Bernal v. The Marquis of Donegal*, 11 Ves. 43, where it was refused on the ground of parliamentary privilege, the defendant being a representative in Parliament of an Irish borough.

<sup>3</sup> Per Lord Eldon, in *Flack v. Holme*, 1 J. & W. 418.

<sup>4</sup> It is not necessary that the defendant should be actually in the State when the writ of *ne exeat* is applied for. *Parker v. Parker*, 1 Beasley (N. J.) 105.

<sup>5</sup> 3 Bro. C. C. 218.

<sup>6</sup> *Howden v. Rogers*, 1 V. & B. 129.

<sup>7</sup> *Flack v. Holm*, 1 J. & W. 415; *Parker v. Parker*, 1 Beasley (N. J.) 105.

<sup>8</sup> *Flack v. Holm*, 1 J. & W. 415; and see *Talleyrand v. Boulanger*, cited *ibid.* 417, and 4 Ves. 587.

<sup>9</sup> *De Carriere v. De Calonne*, 4 Ves. 577. A writ of *ne exeat* may issue against a foreigner or citizen of another State, and on demands arising abroad. *Mitchell v. Bunch*, 2 Paige, 606; *Gibert v. Colt*, 1 Hopk. 500. Upon a bill filed against a foreign executor or administrator, to compel him to account for trust funds which he has received abroad and brought with him into the State, if he is about to depart and go beyond the bounds of the State, he may be arrested on a *ne exeat*

It may be observed here, that, in *Atkinson v. Leonard*,<sup>1</sup> the plaintiff was resident in the Island of Antigua, but no objection was taken to the writ because of the plaintiff's residence out of the jurisdiction of the Court; in *Hyde v. Whitfield*,<sup>2</sup> however, Lord Eldon appears to have considered the circumstance of the plaintiff's being a resident in Scotland, a decided ground of objection to the writ; and, in *Smith v. Nethersole*,<sup>3</sup> Lord Brougham discharged a writ of *ne exeat regno*, which had been issued at the instance of a plaintiff who was resident in Jamaica, against a defendant who was resident in the same colony, on the ground that the plaintiff resided abroad, and that his visit to this country was colorable and temporary only. And the same rule has been acted upon by Sir L. Shadwell in subsequent cases.<sup>4</sup>

A doubt appears to have been raised, in *Stewart v. Graham*,<sup>5</sup> whether a *ne exeat regno* can be granted against a man going abroad in the course of his ordinary business, but Lord Eldon granted the writ, upon the authority of *Dick v. Swinton*,<sup>6</sup> where the writ had been issued to restrain the captain of an East India ship from proceeding on his voyage.<sup>7</sup>

It seems clear, that, in the case of alimony, a *feme covert* may obtain a writ of *ne exeat regno* against her husband.<sup>8</sup>

In *Sedgwick v. Watkins*,<sup>9</sup> Lord Thurlow refused to grant the writ and held to equitable bail, as in other cases. *McNamara v. Dwyer*, 7 Paige, 239. But the writ will be discharged upon the defendant's giving security to abide the decree. *Woodward v. Schatzell*, 3 John. Ch. 412; *Atkinson v. Leonard*, 3 Bro. C. C. (Perkins's ed.) 218, 224, and notes; *Roddam v. Hetherington*, 5 Sumner's Ves. 91. As to the object, uses and mode of obtaining this writ of *ne exeat*, see *Etches v. Lance*, 7 Vesey (Sumner's ed.) 417, note; *Roddam v. Hetherington*, 5 ib. 91, note (a), and cases cited; *De Carriere v. De Calonne*, 4 Sumner's Ves. 577, note (a); 1 Smith Ch. Pr. (2d Am. ed.) 577, note (a); 2 Story Eq. Jur. § 1475, and note.

<sup>1</sup> *Ubi supra*.

<sup>2</sup> 19 Ves. 342.

<sup>3</sup> 2 R. & M. 450.

<sup>4</sup> *Douglas v. Terry*, 2 R. & M. 450, n., and *Walker v. Christian*, *ibid*.

<sup>5</sup> 19 Ves. 313.

<sup>6</sup> 1 V. & B. 371, see also *Tomlinson v. Harrison*, 8 Ves. 32; *Etches v. Lance*, 7 Ves. 417; *Loyd v. Cardy*, Prec. in Ch. 171; *Baker v. Dumaresque*, 2 Atk. 69.

<sup>7</sup> If the party, against whom a final decree is made, intends to remove beyond the jurisdiction of the Court before the decree can be enforced by execution, a *ne exeat* will be granted. *Dunham v. Jackson*, 1 Paige, 629.

<sup>8</sup> *Denton v. Denton*, 1 John. Ch. 364-441; *Yule v. Yule*, 2 Stockt. Ch. (N. J.) 188.

<sup>9</sup> S. C. 3 Bro. C. C. 11; 1 Ves. jr. 49.

writ at the instance of a *feme covert* administratrix against her husband, on her affidavit, that he had possessed the assets and was going abroad. The decision proceeded upon the ground that the evidence of the wife could not be received against the husband. There seems, however, no reason why, where a married woman has property settled to her separate use, the Court should not allow the wife to make an affidavit in support of an application to restrain the husband from defeating his wife's right, by removing out of the jurisdiction of the Court.<sup>1</sup> Probably, since the changes in the law of evidence, a married woman would be considered as having the same rights in this respect in a suit against her husband or any other person.<sup>2</sup>

In *Stewart v. Graham*,<sup>3</sup> a writ of *ne exeat regno* was applied for, on behalf of a lunatic, by his committee, and it was objected that it could not be issued, because the affidavit was made by the committee; but the objection was held not available at law.

The Court will also grant the writ at the instance of a party who has made himself liable to the debt of another, even though he has not been called upon to pay the demand.<sup>4</sup>

It is not necessary, to entitle a plaintiff to a writ of *ne exeat regno*, that it should be prayed by the bill, although, where the application is intended to be made immediately on the filing of the bill, it is usual to pray it, unless either at the time of filing the bill or of amending it he had knowledge of the defendant's intention to go abroad.<sup>5</sup> It frequently, however, happens that the defendant's intention to go abroad arises, or is first discovered, in the course of the case, and then there is no doubt that the writ would be issued, though not asked for by the bill.<sup>6</sup>

<sup>1</sup> In *Bagot v. Bagot*, where real estate was settled to the separate use of a married woman, the Vice-Chancellor of England granted a receiver against the husband, before answer upon notice, the facts of the case being verified by the affidavit of the wife alone; MS. December, 1838, and see also *Shaftoe v. Shaftoe*, 7 Ves. 171; *De Manneville v. De Manneville*, 10 Ves. 56; Mr. Belt's note to *Sedgwick v. Watkins*, 3 Bro. C. C. 11.

<sup>2</sup> In New York and New Jersey, the affidavit of the wife alone is sufficient to support the order for a *ne exeat*. *Denton v. Denton*, 1 John. Ch. 441; *Yule v. Yule*, 2 Stockt. Ch. (N. J.) 138.

<sup>3</sup> 19 Ves. 313.

<sup>4</sup> *Sealy v. Laird*, 3 Swanst. 363.

<sup>5</sup> *Moore v. Hudson*, Mad. & Geld. 219; *Sharp v. Tayler*, 11 Sim. 50; and see *Barned v. Laing*, 13 Sim. 255.

<sup>6</sup> *Collinson v. —*, 18 Ves. 453. This writ may be applied for at any stage of the suit. *Dunham v. Jackson*, 1 Paige, 629. If the party, in the progress of the

In general the writ can only be granted upon a bill filed ;<sup>1</sup> but where, upon the taxation of a solicitor's bill, he was reported to have been overpaid, the client obtained a *ne exeat regno* to prevent his going abroad, though there was no bill in Court whereon to ground the writ.<sup>2</sup> In *Ex parte Bruncker*,<sup>3</sup> however, Lord Talbot discharged a writ, which had been granted by the Master of the Rolls without bill filed, observing that, in his experience, he never knew this writ granted or taken out without a bill in Equity first filed. But it is to be observed, that, in the last case, the plaintiff's demand was one which could only be enforced by bill, whereas, in the first case, the demand was capable of being enforced by means of the authority which the Court exercises over solicitors, as officers of its own.

The application for a writ of *ne exeat regno* may be made by petition,<sup>4</sup> but it is usually now obtained by motion, which may be *ex parte* ; the reason of which is, that the giving notice might operate to occasion the mischief which the writ is intended to prevent, by giving the party an opportunity of removing from the jurisdiction.<sup>5</sup> For the same reason, notice of the motion is not required, even after the defendant has appeared ;<sup>6</sup> but the application must be supported by an affidavit of the debt, and of the intention of the party to go abroad ;<sup>7</sup> and by the first Order of 25th of October, 1852, rule 8, on applications, *ex parte*, for writs of *ne exeat regno*, the party making the application is to deliver copies of the affidavits upon which it is granted, upon payment of the proper charges, immediately on the receipt of a written request from the party or his solicitor, or within such time as may be specified in such request or may have been directed by the Court.

suit, threatens to leave the country, the writ may be applied for by petition, without its being prayed for in the bill, and without an amendment to insert such prayer. 1 Hoff. Ch. Pr. 91. See *Gibert v. Colt*, 1 Hopk. 498 ; *Moore v. Hudson*, 6 Mad. 218.

<sup>1</sup> See *Mattocks v. Tremaine*, 3 John. Ch. 75 ; *The Georgia Lumber Co. v. Bissell*, 9 Paige, 225. Under the same bill, a *ne exeat*, as well as an injunction, may be granted. *Bryson v. Petty*, 1 Bland, 182.

<sup>2</sup> *Loyd v. Cardy*, Prec. in Ch. 171.

<sup>3</sup> 3 P. Wms. 312.

<sup>4</sup> 1 Turn. & V. 987.

<sup>5</sup> See *Collinson v. —*, 18 Ves. 353 ; *Mawer's Case*, 4 De G. & Sm. 349.

<sup>6</sup> *Elliot v. Sinclair*, Jac. 545.

<sup>7</sup> *Roddam v. Hetherington*, 5 Ves. 91 – 95.

It does not appear to be necessary that the affidavit should be made by the plaintiff himself, although it is usually made by him, unless where he is under some legal disability, as in the case of lunacy, when it may be made by his committee; a *feme covert* may also, as we have seen, in certain cases make an affidavit in support of a motion for a *ne exeat*, to restrain her husband from going abroad.<sup>1</sup>

In *Roddam v. Hetherington*,<sup>2</sup> the affidavit appears to have been made by an infant, who was plaintiff, by his next friend; and the writ was issued, but afterwards discharged, with costs to be paid by the next friend, because the infant had sworn positively to facts which, from his age, he could only have known from information.

No rule is more strong than that the writ shall not issue without a *positive* affidavit, and that an affidavit, as to information and belief only, will not be sufficient.<sup>3</sup> The affidavit must be as positive as to the equitable debt, as an affidavit of a legal debt to hold to bail;<sup>4</sup> and even where the affidavit is positive, yet if it appear that, under the circumstances, the deponent could only have acquired his knowledge from the information of others, it will be insufficient.

The only exception to the rule, that the affidavit must be positive, is, as we have seen, in the case of an account, in which the

<sup>1</sup> *Ante*, pp. 1808, 1809; *McGee v. McGee*, 8 Georgia, 295.

<sup>2</sup> 5 Ves. 91. [Sumner's ed. notes.]

<sup>3</sup> *Roddam v. Hetherington*, *ubi supra*; *Darley v. Nicholson*, 1 Dr. & W. 66; *Yule v. Yule*, 2 Stockt. Ch. (N. J.) 138, 141. See *Sherman v. Sherman*, 3 Bro. C. C. (Perkins's ed.) 370, notes (a) and (b); *Flack v. Holme*, 1 Jac. & Walk. 405; *Holliday v. Riordan*, 2 Georgia, 629; *Howden v. Rogers*, 1 Ves. & Bea. 129; *Mattocks v. Tremaine*, 3 John. Ch. 75; *Rhodes v. Cousins*, 6 Rand. 188; *Gibert v. Colt*, 1 Hopk. 500; *Gernoe v. Bocaline*, 2 Wash. C. C. 130; *Thorne v. Halsey*, 7 John. Ch. 193; 1 Hoff. Ch. Pr. 93-95; *Rice v. Hale*, 5 Cushing, 241; *McGehee v. Polk*, 24 Georgia, 406. In *Smedburg v. Mark*, 6 John. Ch. 138, the Court refused an application for a *ne exeat*, because, for one reason, the application was against an executor, and there was no charge or affidavit that assets had come to the hands of the defendant. See, also, *M'Namara v. Dwyer*, 7 Paige, 239. The debt need not appear by affidavit. It is sufficient if established by a Master's report. *Yule v. Yule*, 2 Stockt. (N. J.) 138, 141; *Collinson v. —*, 18 Vesey, 353. Or it may be shown by or reference to accounts, or to other authorized documents, to the reasonable satisfaction of the Court, that something in the nature of the ascertainment of a debt has taken place, whereupon a debt arises. *Rice v. Hale*, 5 Cushing, 241.

<sup>4</sup> *Jackson v. Petrie*, 10 Ves. 164.

plaintiff may swear, that, to the best of his belief, such a sum will be due to him on the balance.<sup>1</sup>

It is also required, that the affidavit, on which the application for this writ is founded, should show that the defendant intends going abroad.<sup>2</sup> It seems, formerly, to have been thought that the affidavit was, in this respect, sufficient, if it merely stated a belief of the defendant's intention to quit the kingdom, without going into the circumstances upon which that belief was founded.<sup>3</sup> But this rule has been very properly qualified by later decisions; and it is now held that the affidavit, to obtain this writ, must be positive as to the defendant's intention to go abroad, or to his threats or declarations to that effect, or to facts evincing it.<sup>4</sup> In *Oldham v. Oldham*<sup>5</sup> the Court observed, "it is not sufficient to show that another person said so"; but this must be understood with some qualifications.

The questions, how far it is necessary for the affidavit to allege, that the defendant intends going abroad *to avoid the jurisdiction*, or that the debt will be endangered by his quitting the kingdom, have been more than once under discussion; and the result seems to be that the affidavit will be sufficient, if it states, that the debt

<sup>1</sup> Ante, p. 1806, and note.

<sup>2</sup> *Mattocks v. Tremaine*, 3 John. Ch. 75. There ought to be a positive affidavit of a threat or purpose to go abroad; *ib.* 76, and that the debt would be endangered thereby. *Ib.*; *Rhodes v. Cousins*, 6 Rand. 188. The affidavit need not, however, state that the defendant is going abroad for the purpose of avoiding the payment of the debt. *Russell v. Ashby*, 7 Sumner's Vesey, 96 and notes. By the Act of Congress, 2d of March, 1793, ch. 22, § 5, it is provided that "no writ of *ne exeat* shall be granted, unless a suit in Equity be commenced, and satisfactory proof shall be made to the Court or Judge granting the same, that the defendant designs quickly to depart from the United States."

<sup>3</sup> Beames on *Ne ex.* 33; *Russell v. Ashby*, 5 Ves. 96; see, also, *Chapeaurouge v. Carteaux*, in a note to *Amsinck v. Barklay*, 8 Ves. 597.

<sup>4</sup> Beames on *Ne ex.* 33; *Oldham v. Oldham*, 7 Ves. 410; *Etches v. Lance*, 7 Ves. 417; *Hannay v. M'Entire*, 11 Ves. 54; *Jones v. Alephsin*, 16 Ves. 470; *Taylor v. Leitch*, 1 Dick. 380; *Sherman v. Sherman*, 3 Bro. C. C. 370; *Hyde v. Whitfield*, 19 Ves. 342; *Yule v. Yule*, 2 Stockt. (N. J.) 138; *Moore v. Gleaton*, 23 Georgia, 142; *Woods v. Symmes*, 25 Georgia, 69; *McGee v. McGee*, 8 Georgia, 295. The writ of *ne exeat* will not be issued by the Court upon the application of a party, unless facts are set out, on which the Court can repose its belief. The fears and apprehensions of the party are not sufficient to authorize the issuing of the writ. *Forrest v. Forrest*, 10 Barb. Sup. Ct. 46.

<sup>5</sup> 7 Ves. 410.

will be endangered by the defendant's quitting the kingdom, without stating that the object is to avoid the jurisdiction.<sup>1</sup>

The order for the writ having been passed and entered, must be delivered to the plaintiff's solicitor, who will, thereupon, make out the writ, and get it sealed by the proper officer. The form of the writ is as follows, viz. : —

“ VICTORIA, &c. — *To our Sheriff of —, greeting: Whereas it is represented to us in our Court of Chancery, on the part of A. B., complainant, against C. D., defendant, (amongst other things), that he, the said defendant, is greatly indebted to the said complainant, and designs quickly to go into parts beyond the seas, (as by oath made in that behalf appears), which tends to the great prejudice and damage of the said complainant, Therefore, in order to prevent this injustice, we do hereby command you, that you do, without delay, cause the said C. D. personally to come before you, and give sufficient bail or security, in the sum of —, that he, the said C. D., will not go, or attempt to go, into parts beyond the seas, or to Scotland, without leave of our said Court; and, in case the said C. D. shall refuse to give such bail or security, then you are to commit him, the said C. D., to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and when you shall have taken such security, you are forthwith to make and return a certificate thereof to us, in our said Court of Chancery, distinctly and plainly under your seal, together with this writ. Witness ourself at Westminster, the — day of —, in the — year of our reign.*”<sup>2</sup>

The writ must be marked on the back with the amount of the sum for which the defendant is to give security, *in words at length*.<sup>3</sup> This is done as a guide to the sheriff, to take sufficient

<sup>1</sup> *Stewart v. Graham*, 19 Ves. 313; *Boehm v. Wood*, 1 Turner & Russell, 332; *Yule v. Yule*, 2 Stockt. Ch. (N. J.) 140, 141; *Atkinson v. Leonard*, 3 Bro. C. C. 318; *Mattocks v. Tremaine*, 3 John. Ch. 75; *Rhodes v. Cousins*, 6 Rand. 188. Danger of loss may be inferred from the fact that the defendant has permanently removed out of the State. *McGehee v. Polk*, 24 Georgia, 406.

<sup>2</sup> Harr. (ed. Newl.) 537; Hinde, 611; *Rice v. Hale*, 5 Cushing, 242, 243; App. to Hoffman's Ch. P. xli.; *McGehee v. Polk*, 24 Georgia, 406.

<sup>3</sup> Beames on *Ne ex.* 93. The Court, allowing the writ, directs a sum, in which the defendant is to be held to bail upon it, sufficient to cover not only the existing debt, but a reasonable amount of future interest; having regard to the prob-

security, by bail bond, for the defendant's yielding obedience thereto.<sup>1</sup>

Where the writ is issued against a personal representative, at the instance of a legatee, or person claiming a share of the residue, it must be marked for the whole amount due from the defendant, not to the plaintiff only, but to all the other persons interested in the estate;<sup>2</sup> and it seems, from a case cited by Mr. Beames, from the Registrar's book, that the Court will sometimes extend the amount of the security required, beyond that of the debt sworn to, for the purpose of covering the costs of proceedings at Law.<sup>3</sup> In *Boehm v. Wood*,<sup>4</sup> also, the writ was marked for the full amount of the purchase-money, though the defendant was entitled to an abatement, the amount of which, however, had not been ascertained.

Where the writ has been indorsed for a larger sum than is really due, there is no doubt that the Court will make an order that the security shall be for so much only as is really due, without quashing the writ, and that, too, upon the hearing of a motion to quash it.<sup>5</sup>

To carry this process into effect, the writ must be delivered to the proper sheriff, with instructions for executing it. By the terms of the writ, the sheriff is to cause the party, personally, to come before him, and give sufficient bail or security in the sum indorsed on the writ, that he will not go, or attempt to go, into parts beyond the seas, without leave of the Court, and, on his refusal, he is to commit him to the next prison.<sup>6</sup> It is said, that it is an abuse of this process to break open doors, and take the party in bed; however, where this had been done, the Court refused to set him at liberty.<sup>7</sup>

able duration of the suit. And the sheriff must take a bond in the sum directed by the Court, without any addition. *Gibert v. Colt*, 1 Hopk. 500. See *M'Namara v. Dwyer*, 7 Paige, 239; *Gleason v. Clisby*, 1 Clarke, 551. If the writ is actually marked by the clerk, it will be presumed to have been done so in pursuance of the order of the Court. *Gleason v. Clisby*, 1 Clarke, 551.

<sup>1</sup> *Hinde*, 611.

<sup>2</sup> *Pannell v. Tayler*, T. & R. 100.

<sup>3</sup> *Bonner v. Worthington and Pink*, Beames on *Ne ex.* 94; Reg. lib. A. 1819, fol. 12.

<sup>4</sup> T. & R. 332.

<sup>5</sup> *Pannell v. Tayler*, T. & R. 100.

<sup>6</sup> 1 Turn. & V. 990.

<sup>7</sup> *Prac. Reg.* 290; *Curs. Canc.* 455. See *Gile v. Devens*, 11 Cushing, 59; *Per-*

When a caption is made, the defendant, to obtain his discharge out of custody, must execute a bond, with two sufficient sureties, to the sheriff, in double the sum marked on the writ,<sup>1</sup> conditioned not to go or attempt to go into parts beyond the seas, or into Scotland, without the leave of the Court.<sup>2</sup>

It is to be observed, that the sheriff is directed by the writ, to cause the defendant to give *sufficient* bail, or security, not to go, or attempt to go, beyond seas, &c. He is, therefore, not bound to take any security but what he may be satisfied is likely to prove effective. So that when he insisted that the money should be paid into his hands, before the defendant was discharged, Lord Eldon held, that the sheriff was right in the course he had pursued; "for whatever the sheriff does, under a writ of *ne exeat regno*, is upon his own responsibility,<sup>3</sup> and what he had done, was merely to require a sufficient security for his having the defendant to produce."<sup>4</sup>

cival v. Stamp, 9 Exch. 167. But see, in reference to acts done through an abuse of process, *Ilsey v. Nichols*, 12 Pick. 270; where an attachment was held unlawful and invalid, when made by an officer who had broken open a dwelling-house by forcing an outer door, against the prohibition of the owner, with the direct and avowed purpose of making such attachment of the owner's goods in the dwelling-house. See also the authorities cited and commented on by the Court, in *Ilsey v. Nichols*, *ubi supra*.

<sup>1</sup> In *Gibert v. Colt*, 1 Hopk. 500, the Court held, that the sheriff is not to double the sum marked, but is to take the bond in the sum directed by the Court, without any addition. See ante, 1813, 1814, note. See the form of a bond to be executed by the defendant, on a writ of *ne exeat* being served on him, set out in *Cox v. Scott*, 5 Harr. & John. 334.

<sup>2</sup> 1 Turn. & V. 990. See *McGee v. McGee*, 8 Georgia, 295. In Massachusetts, the Supreme Court may discharge the defendant from imprisonment on a writ of *ne exeat*, upon an application by him to the Court for that purpose, and an examination of the defendant by a Master in Chancery, in the same manner as if he was a poor prisoner committed in execution, or arrested on mesne process for debt. *Rice v. Hale*, 5 Cushing, 238.

<sup>3</sup> See *Brayton v. Smith*, 6 Paige, 489. The obligations devolved upon sureties entering into a bond conditioned to obey such a writ, bear a close resemblance to the duties and responsibilities of bail at common law. They undertake that the defendant shall be responsible for the performance of the orders and decrees of the Court. *Johnson v. Clendenin*, 5 Gill & John. 463. And where the defendant in a writ of *ne exeat* has been proceeded against and committed to jail for not complying with a final decree of the Court, in the cause, and afterwards escapes from custody, his sureties upon the *ne exeat* bond are not responsible, and the Court, as respects them, may order the bond to be cancelled. *Ib.*

<sup>4</sup> *Boehm v. Wood*, T. & R. 340.

From this it appears that, instead of bail, the sheriff may take a deposit of the amount indorsed upon the writ.<sup>1</sup>

The sheriff, after he has executed the writ, ought to return it, indorsing upon it a proper return of what he has done. If he has taken bail, it may be in the following form: — “*I have caused the within-named A. B. personally to come before me, and he found bail in the penalty of £ —, according to the command of this writ.*”<sup>2</sup>

So, also, if, instead of taking security according to the direction of the writ, he takes a deposit of the amount indorsed on the writ, he should make a return to that effect; and it appears, that where the sheriff omitted to do so, the Lord Chancellor ordered him to make his return within a given time.<sup>3</sup>

After the party has been taken upon the writ, and given security, he must be careful not to go abroad, without previously applying to the Court, to discharge it, otherwise the Court, it seems, will order the sureties to pay the money into Court within a certain time, although the defendant's going abroad was the consequence of a mistake as to the effect of the bond.<sup>4</sup>

The application to discharge the writ is made by motion; if security has been given, the notice of motion should state that application will be made as well for the discharge of the writ, as that the bond may be given up to be cancelled.<sup>5</sup> Applications to this effect have in former times been made before answer, and probably now, that an answer is not essential, an application may be made at any period of the cause.<sup>6</sup>

If, upon an application to discharge or quash the writ on the ground of irregularity, the Court thinks that it has been improperly issued, it will at once order it to be discharged, but leave will

<sup>1</sup> See *Bonner v. Worthington*, Reg. lib. *ubi supra*.

<sup>2</sup> Impey, *Office of Sheriff*, ed. 1835.

<sup>3</sup> *Bonner v. Worthington*, Reg. lib. A. 1819, fol. 233; cited Beames, *Ne ex.* 97.

<sup>4</sup> *Musgrave v. Medex*, 1 Mer. 49; *Utten v. Utten*, *ibid.* 51.

<sup>5</sup> The giving the usual security to the sheriff upon a *ne exeat*, does not preclude the defendant from applying upon the bill only, or upon the coming in of the answer to have the writ discharged and the bond to the sheriff given up and cancelled. *Jesup v. Hill*, 7 Paige, 95. The motion should be made without unreasonable delay. And accordingly, where an application to discharge a *ne exeat* was not made until after the cause had been noticed for a final hearing, it was refused. *Miller v. Miller*, 1 Saxton Ch. (N. J.) 386.

<sup>6</sup> See *Grant v. Grant*, 3 Russ. 598. For form of order for discharge upon giving security, 2 Seton Dec. (3d English ed.) 959.

be given to make another application.<sup>1</sup> It will not, however, discharge the writ, merely because it appears to have issued for a sum exceeding that for which it can be sustained; but, in such cases, the amount for which it has been marked will be reduced.<sup>2</sup> Nor will it discharge a writ of this nature, obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to go abroad, upon a counter-affidavit by the defendant denying the intention.<sup>3</sup> In *Jones v. Alephsin*,<sup>4</sup> also, the Court refused to quash the writ upon the defendant's affidavit that no debt was due, and that the plaintiff had made admission to that effect, the plaintiff, having, by his affidavit, sworn positively to there being a debt.

The Court will discharge the writ upon merits, whenever it appears, by the circumstances of the case, as disclosed by the affidavits upon which it was granted and the answer of the defendant, either that the plaintiff has no case, or that the defendant is not going out of the jurisdiction,<sup>5</sup> and this it will do either absolutely or conditionally, *i. e.*, upon the defendant's giving security to abide and perform the decree of the Court.<sup>6</sup>

The Court will, also, discharge a *ne exeat regno*, upon the defendant's paying into Court the sum for which the writ is marked.<sup>7</sup>

<sup>1</sup> *Hopkin v. Hopkin*, 10 Hare, App. 2.

<sup>2</sup> *Grant v. Grant*, 3 Russ. 599.

<sup>3</sup> *Amsinck v. Barklay*, 8 Ves. 594.

<sup>4</sup> 16 Ves. 470.

<sup>5</sup> *Leo v. Lambert*, 3 Russ. 417. As to the supporting an application to discharge the writ by affidavits, see *Russell v. Ashby*, 5 Vesey, 98; *Boehm v. Wood*, T. & R. 332; *Fitch v. Richardson*, 1 Morris, 245. Affidavits may be read both in support of and against the motion to discharge the writ. *Flack v. Holm*, 1 Jac. & Walk. 414; 1 Hoff. Ch. Pr. 363. And it is open to the defendant by affidavit to deny the allegations on which it was granted. *O'Connor v. Debraine*, 3 Edw. Ch. 230; *Cowdin v. Cram*, 3 Edw. Ch. 231.

<sup>6</sup> *Roddam v. Hetherington*, 5 Ves. 91; *Boon v. Collingwood*, 1 Dick. 115; *Atkinson v. Leonard*, 3 Bro. C. C. 223; *Parker v. Parker*, 1 Beasley (N. J.) 105. In New York, it is a matter of course to discharge a *ne exeat* upon the defendant's giving security to answer the plaintiff's bill, where a discovery is necessary, and to render himself amenable to the process of the Court pending the litigation, and to such process as may be issued to compel a performance of the final decree. *M'Namara v. Dwyer*, 7 Paige, 239; *Mitchell v. Bunch*, 2 Paige, 606; *Gleason v. Bisby*, 1 Clarke, 551. See *Brayton v. Smith*, 6 Paige, 489.

<sup>7</sup> *Evans v. Evans*, 1 Ves. jr. 86; *Stewart v. Graham*, 19 Ves. 314; *Dick v. Swinton*, 1 V. & B. 373. In *Gibert v. Colt*, 1 Hopk. 501, the defendant brought the amount for which the writ was marked into Court, and the writ and bond were discharged by consent.

It may be observed here, that the order directing the writ to issue, generally directs that the defendant shall be restrained from going abroad, until answer and *further order*; the Court, therefore, will not discharge the writ merely upon the coming in of the answer, if it appears, upon the merits of the case, that there will be necessarily decreed things for the defendant to do at the hearing.<sup>1</sup>

It has also been decided, that a surety on a writ of *ne exeat regno* shall not be discharged upon the principal's putting in his answer, nor even upon such principal being, by a subsequent process of the Court, committed to prison, the Court observing, that the surety was then in no danger.<sup>2</sup>

The applications in *Le Clea v. Trot*, and *Stapylton v. Peile*, were *previous to the decree*: but where, *after a decree* against the defendant for the same matter as that for which the writ of *ne exeat regno* issued, the defendant being in contempt, and in custody for not performing the decree, the sureties applied for that purpose, they obtained an order that they should be discharged, and the bond as to them cancelled.<sup>3</sup>

<sup>1</sup> *Atkinson v. Bedel*, 1 Dick. 98.

<sup>2</sup> *Le Clea v. Trot*, Prec. in Ch. 230. In a MS. in Mr. Beames's possession, written by Sir George Carey, the Master in Chancery, and author of the small volume of reports which passes under his name, there is the following passage: — "A bail in this Court, or in the Civil Law, is not discharged upon bringing in the principal, as he is at Common Law. *Archepoole contra Burrell*, Michaelm. 23 & 24 Eliz." But Tothill's note of *Archboll v. Burrell*, which seems to be the same case as Sir George Carey mentions under the name of *Archepole contra Burrell*, is simply in these words: — "A bail in this Court, or in the Civil Law, is discharged upon bringing in the principal, as he may at the Common Law." — Tothill, p. 17, and see *Griffith v. Griffith*, 2 Ves. 400.

<sup>3</sup> *Debazin v. Debazin*, 1 Dick. 95. The defendant, an executor, was, immediately after filing of the bill, arrested on the *ne exeat*. He gave security for 450 l.; two persons, of the names of *Randean* and *Tonsey*, being his bail to the sheriff upon the writ. Afterwards, a decree was pronounced in favor of the plaintiff, with costs. A writ of execution of the decree was issued, which was followed by an attachment for non-performance. On this attachment the defendant was arrested, and committed to the Fleet, "for the same matter for which the said *ne exeat* issued, as appears by the certificate of the Warden of the Fleet." The sureties, *Randean* and *Tonsey*, applied to be discharged, &c., and an order was pronounced "that the said *Randean* and *Tonsey*, the defendant's two sureties, who entered into the said bail-bond for the defendant *Debazin*, on the said writ of *ne exeat*, be discharged, and that the said bond as to them be cancelled." *Debazin v. Debazin*, Reg. lib. A. 1743, fol. 64. For form of discharge, and inquiry as to damages, and payment according to undertaking, see 2 Seton Dec. (3d Eng. ed.) 960.

## CHAPTER XLI.

### PAYMENT OF MONEY AND TRANSFER OF STOCK INTO COURT.

#### SECTION I. — *In what Cases directed.*

ONE of the most ordinary methods by which the Court enforces its jurisdiction of preserving property in dispute pending a litigation, is by ordering it to be brought in and deposited with the Accountant-General of the Court.

The payment of money or the transfer of stock into Court is most usually ordered on interlocutory application, in the case of personal representatives or other persons filling the characters of trustees having money in their hands, or stock under their control, which belong either wholly or in part to the plaintiff.<sup>1</sup>

It appears formerly to have been thought necessary for the plaintiff to show, in support of an application of this nature, that the executor or trustee had abused his trust, or that the fund was in danger from his insolvent circumstances, but the Court will now order so much of the trust estate as he admits to be in his hands to be paid into Court, whether he has abused his trust or not,<sup>2</sup> and without requiring proof of any danger to the property pending the litigation.<sup>3</sup>

<sup>1</sup> Where a sum is reported to be due from a defendant guardian, and he acquiesces in the report, but the cause is delayed by other questions, the Court will order the reported sum to be paid into Court. *Clarkson v. Depeyster*, 1 Hopk. 274. See *Campbell v. Braxton*, 4 Hen. & Munf. 446. To obtain an order upon a defendant to bring money into Court before the final hearing, it must appear that he who asks it has an interest in the money, that he who holds it has no equitable right to it, and the facts as then shown must be open to no further controversy. *M'Kim v. Thompson*, 1 Bland, 156.

<sup>2</sup> *M'Kim v. Thompson*, 1 Bland, 156. Where it appears from the answer of a defendant guardian, that he has in his hands a specific sum, which he admits to be due to the plaintiff, and other matters in the suit are contested, the Court will order the admitted debt to be paid to the plaintiff without waiting for a final decree. *Clarkson v. Depeyster*, 1 Hopk. 274.

<sup>3</sup> *Strange v. Harris*, 3 Bro. C. C. 365, Perkins's ed. note (a); and see *Blake v. Blake*, 2 Scho. & Lef. 26; *Rutherford v. Dawson*, 2 B. & B. 17. See *Hall v. Hall*, 2 McCord Ch. 317; *Hosack v. Rogers*, 6 Paige, 415. Money may be brought into Court by trustee under a decree, if he doubts as to its proper application. *Wells v. Roloson*, 1 Bland, 456. So to stop interest and costs in certain cases. *Chase v. Manhardt*, 1 Bland, 343.

In *Blake v. Blake*,<sup>1</sup> Lord Redesdale appears to limit the rule, as regards personal representatives, to cases in which there are no debts, or the debts are all paid, and there is no purpose for which the money is to be left outstanding; but the rule appears to be more extensive, and the balance in the executor's hands will in some cases be ordered into Court, notwithstanding there are demands upon it to which the executor is liable. Thus, in *Yare v. Harrison*,<sup>2</sup> an executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court, although he stated that an action at Law was depending against him for a debt to a considerable amount due from the testator. The Court, however, gave the executor liberty to apply, in case the plaintiff in the action should recover against him; and it is to be observed that, upon a verdict being recovered at Law for upwards of 1,700*l.*, the executor applied to the Court that it might be paid out to him, to satisfy the verdict, but that the Court ordered the money to be paid to the plaintiff in the action, and not to the executor; and upon a suggestion that the executor had incurred unnecessary costs and interest, by defending the action, the consideration of the question — whether the defendant should not answer personally to the estate for the amount of such interest and costs, was reserved to the hearing.

The same principle will apply to other persons than executors, who fill the character of trustees, whether they be such by virtue of an actual appointment or by implication. Upon this principle, the Court has ordered an auctioneer to pay into Court the balance of the deposit upon a sale, admitted by him to be in his hands, after deducting his claims as auctioneer.<sup>3</sup> Upon the same principle, where a testator having a debt secured on lands, bequeathed the debt to the mortgagor, with a desire that he would give a reversionary interest therein to a third person, and the mortgagor sold the estate, he was ordered to bring the mortgage-money into Court, for the benefit of the devisee, subject to his own life-estate;<sup>4</sup> and so where the defendant had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, whereupon a bill was filed against him for the performance of

<sup>1</sup> *Ubi supra*.

<sup>2</sup> 2 Cox, 377, but see *Betagh v. Concannon*, 2 Moll. 559.

<sup>3</sup> *Yates v. Farebrother*, 4 Mad. 239.

<sup>4</sup> *Lewis v. King*, 2 Bro. C. C. 600.

the trusts of the settlement, to which he put in his answer admitting the settlement, and that the money in question was in his hands, he was ordered to pay it into Court. In making this order, the Court acted upon the principle, that, where an answer contains a clear admission that there is trust-money in the hands of the defendant, the Court will make an interlocutory order for securing it.<sup>1</sup>

So also, where an executor admits a sum of money to be due from him, in his individual character, to his testator, the Court will order the amount to be paid into Court;<sup>2</sup> and this was done, notwithstanding a statement in the answer that the debts of the testator were not all paid, and that there were several outstanding to which the executor was liable.<sup>3</sup>

It is to be observed, that, in such cases, the Court proceeds upon the ground that, as the persons to pay and persons to receive are the same, it assumes that what ought to have been done has been done, and orders the payment, not as a debt by a debtor, but as of moneys realized and in the hands of the executor or trustee.<sup>4</sup>

Upon the same principle, money admitted by an executor to be in the hands of his partner will be considered as in his own hands for the purpose of being called into Court;<sup>5</sup> but in *Freeman v. Fairlie*,<sup>6</sup> it was held, that an admission by an executor that the whole amount of the property was invested in India, on public securities, either in his own name or in the name of a house in which he was a partner, but subject to his disposal, unless some part was in the hands of the house at interest, which he believed might be the case, was held not to be a sufficient admission of money in his hands to order the payment into Court of any part

<sup>1</sup> *Rothwell v. Rothwell*, 2 S. & S. 218.

<sup>2</sup> *Ibid.* *Hall v. Hall*, 2 McCord Ch. 317.

<sup>3</sup> *Mortlock v. Leathes*, 2 Mer. 491.

<sup>4</sup> See *Casey v. Goodinge*, 3 Bro. C. C. (Perkins's ed.) 110, 111, note (a), and cases cited; *Wankford v. Wankford*, 1 Salk. 299; *Winship v. Bass*, 12 Mass. 199; *Stephens v. Gaylord*, 11 Mass. 266; *Hays v. Jackson*, 6 Mass. 149; *Bigelow v. Bigelow*, 4 Ham. 138; *Lockier v. Smith*, 1 Keb. 313; *Kinney v. Ensign*, 18 Pick. 232, 236; *Hobart v. Stone*, 10 Pick. 220; *Ritchie v. Williams*, 11 Mass. 50; *Ips. Manuf. Co. v. Story*, 5 Metcalf, 310; *Bowen v. Fairman*, 6 Conn. 121; 2 Story, Eq. Jur. § 1209; *Pusey v. Clemson*, 9 Serg. & R. 208; *Decker v. Miller*, 2 Paige, 149; *Stagg v. Beckman*, 2 Edw. Ch. 89; *Marvin v. Stew*, 2 Cowen, 781; *Schell v. Schroder*, 1 Bailey Eq. 334.

<sup>5</sup> *Johnston v. Aston*, 1 S. & S. 73; *White v. Barton*, 18 Beav. 193.

<sup>6</sup> 3 Mer. 39.

of it;<sup>1</sup> for although an executor, dealing with money in his hands, is bound to ear-mark it, yet if he does not do so, and cannot answer as to the state of it, the Court has no power to act as upon an admission.<sup>2</sup>

It is to be observed, that it is only upon the admission of the executor, or other trustee, that the trust-money is actually in his hands, that the Court will order it to be paid in; if, therefore, a defendant admits a sum of money to have come to his hands properly belonging to the trust, but adds that he has made payments on account of the estate, he will be allowed to deduct the amount of his actual payments, and to pay in the balance only, unless the plaintiff has challenged the items.<sup>3</sup>

This, however, will be the case only where the payments have been properly made; where the payments have been improperly made, *e. g.* where they involve a breach of trust, the trustee will not be permitted to avail himself of such payments for the purpose of resisting the payment into Court; therefore, where executors had by their answer admitted the receipt of the testator's property, but stated that they had lent it on a promissory note, it was held that, having admitted the receipt of the money, the executors could not, by alleging an improper application of it, protect themselves from payment into Court.<sup>4</sup> So also, where moneys directed by a settlement to be laid out in government or real securities were lent by the trustees to the husband on bond, the trustees were ordered, on motion, to pay the money into Court.<sup>5</sup>

This principle was likewise acted upon in *Rothwell v. Rothwell*,<sup>6</sup> before referred to, in which the Court ordered the defendant to pay in a sum of money which he had contracted to pay to the trustees of his marriage settlement, but had omitted to pay.

And it is not only in cases where trust-money has been improperly lent, that it will be ordered into Court, it will be ordered in, even where the lending may have been warranted, by the trust-deed, upon the allegation that the fund is in danger.<sup>7</sup>

<sup>1</sup> *Freeman v. Fairlie*, 3 Mer. 39.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Anon.* 4 Sim. 359; *Nokes v. Seppings*, 2 Phil. 19.

<sup>4</sup> *Vigrass v. Binfield*, 3 Mad. 62; see, also, *Beaumont v. Meredith*, 3 V. & B. 180.

<sup>5</sup> *Collis v. Collis*, 2 Sim. 365.

<sup>6</sup> 2 S. & S. 217.

<sup>7</sup> *Payne v. Collier*, 1 Ves. jr. 170.

It is to be observed, that, in order to induce the Court to direct the immediate bringing in of a sum of money upon an interlocutory application, the money must be clearly trust-money; where it is not impressed with a trust, but is in the nature of a mere debt, the Court will not make an order for the payment of it into Court till the hearing of the cause: thus, where a bill was filed against a defendant, insisting that a certain sum of money, claimed by her as a gift from the testator shortly before his death, continued to be part of his assets, and upon the coming in of the answer the plaintiff moved that the defendant might pay the money into Court, on the ground that she had admitted circumstances in her answer which made it clear that it was part of the testator's assets, but was refused on the ground that the relief sought was "matter of decree."<sup>1</sup>

It is not necessary, to induce the Court to order trust-money to be paid in, that the trust should be one absolutely declared; it will, in many cases, do the same where the trust is only implied; as in the case of vendors and purchasers, in which case, as the Court considers what is agreed to be done as done, it will treat the vendor as a trustee for the purchasers of the estate contracted for, and the purchaser as a trustee for the vendor of the purchase-money.<sup>2</sup>

Lord St. Leonards, in his learned Treatise upon the Law of Vendors and Purchasers of Estates,<sup>3</sup> thus states the rule in practice of calling upon the purchasers of estates to pay their purchase-money into Court: "A new practice has sprung up by which certainly some suits have been quickly disposed of, but which has been a great surprise upon many parties. I allude to the practice of ordering a purchaser *in possession of the estate*, upon motion, to pay the purchase-money into Court. This, under special circumstances, has even been done before answer,<sup>4</sup> but the purchaser has in some cases had the option to pay the money or give up possession;<sup>5</sup> in others occupation rent has been set, deducting in-

<sup>1</sup> *Peacham v. Daw*, Mad. & Geld. 98; but see *Rothwell v. Rothwell*, 2 S. & S. 217; and *Lee v. Macaulay*, 1 Y. & C. 267; Exch. Rep.

<sup>2</sup> *London and North-Western Railway Company v. Corporation of Lancaster*, 15 Beav. 22.

<sup>3</sup> Vol. i. p. 357.

<sup>4</sup> *Dixon v. Astley*, 1 Mer. 183; see *Burroughs v. Oakley*, ib. 52, 376, n.; *Blackburn v. Stace*, Mad. & Geld. 69.

<sup>5</sup> *Clarke v. Wilson*, 15 Ves. 317, Sumner's ed., Mr. Hovenden's note; *Smith*

terest on the deposit,<sup>1</sup> and in others a Receiver has been appointed;<sup>2</sup> and payment of the money will be ordered, although by the agreement it is payable by instalments, and a portion of it is to remain secured upon the estate.<sup>3</sup>

This rule has been adopted where the possession has been given under a mutual apprehension that the title could be immediately made good,<sup>4</sup> where the purchaser had a sort of mixed possession with the vendor, and having paid part of the purchase-money, was insolvent, and had attempted, without effect, to sell the estate,<sup>5</sup>—where the purchaser approved of the title and prepared a conveyance, and then raised objections,<sup>6</sup>—where the purchaser had been guilty of laches and cut underwood;<sup>7</sup> even in a case where it appeared, on the face of the abstract, that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser.<sup>8</sup> So where, from circumstances, an acceptance of the title was inferred.<sup>9</sup> Again, where a time was fixed for the payment of the purchase-money by instalments, and the property was a *coal mine*.<sup>10</sup> In all these cases the rule has been applied, and if the estate be sold under a *decree*, the purchaser, if he enters into possession, will be compelled to pay his purchase-money into Court, unless he entered with the express consent of the Court.<sup>11</sup>

But where the sale is not by the Court, and the seller has thought proper to put the purchaser into possession, with an understanding between them that he shall not pay his money until

*v. Lloyd*, 1 Mad. 83; *Morgan v. Shaw*, 2 Mer. 138; *Wickham v. Evered*, 4 Mad. 53.

<sup>1</sup> *Smith v. Jackson*, 1 Mad. 618; *Smith v. Lloyd*, *ubi supra*.

<sup>2</sup> *Hall v. Jenkinson*, 2 V. & B. 125; see *Clarke v. Elliott*, 1 Mad. 606.

<sup>3</sup> *Younge v. Duncombe*, 1 You. 275.

<sup>4</sup> *Gibson v. Clarke*, 1 V. & B. 500; see 1 Mad. 607.

<sup>5</sup> *Hall v. Jenkinson*, *ubi supra*.

<sup>6</sup> *Walters v. Upton*, Coop. 92, n.; but see *Bonner v. Johnston*, 1 Mer. 366; and see *Crutchley v. Jerningham*, 2 Mer. 502; *Fournier v. Edwards*, T. T. 1819, V. C. The deeds were executed and an application was made for the completion of the purchase, but the purchaser had not the money. The motion was made upon the answer, by which the defendant claimed compensation for some charges.

<sup>7</sup> *Burroughs v. Oakley*, 1 Mer. 52, 376, n.; *Dixon v. Astley*, *ib.* 133, 378, n.; *Bradshaw v. Bradshaw*, 2 Mer. 492.

<sup>8</sup> *Brown v. Kelty*, L. I. Hall, July, 1816, MS.

<sup>9</sup> *Boothby v. Walker*, 1 Mad. 197; and see *Smith v. Lloyd*, 1 Mad. 83.

<sup>10</sup> *Buck v. Lodge*, 18 Ves. 450.

<sup>11</sup> *Anon.* L. I. Hall, 16th July, 1816, MS.

he has a title, the purchaser cannot be called upon to pay the money into Court in this summary way;<sup>1</sup> nor can the payment be compelled where the vendor gives possession without stipulation,<sup>2</sup> or the purchaser was in possession under another title before the contract;<sup>3</sup> or the possession was given independently of the contract, and the seller has been guilty of laches;<sup>4</sup> although, in such cases, the purchaser may make himself liable to the demand, by dealing improperly with the estate, *e. g.* cutting trees or selling it to another person.<sup>5</sup> But the purchaser, after a long period, will not be permitted to keep possession of the estate and also withhold the purchase-money: if a title has not been made, he will be put to his election within a reasonable time, *e. g.* two months, to give up the possession or pay the purchase-money.<sup>6</sup>

If an agreement be by parol, for sale, at so much per acre, and possession be given to the purchaser without any understanding respecting the period when the purchase-money should be paid, and the bill alleges a quantity of land to be sold, which is denied by the answer, and the bill only seeks a performance as to the larger quantity, no money will be ordered into Court.<sup>7</sup>

The same learned author then proceeds to deduce two simple rules from the cases: "1st. Where the possession is taken under the contract or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course."

"But 2d. If the possession by the purchaser without payment of the money is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example, cutting timber by which the property is lessened in value, or selling the estate by which the first seller's remedy is complicated without his assent; in such cases, the Court will interpose and compel the purchaser to pay the purchase-money into Court."

<sup>1</sup> *Gibson v. Clarke*, 1 V. & B. 500.

<sup>2</sup> *Clarke v. Elliott*, 1 Mad. 606.

<sup>3</sup> *Freebody v. Perry*, Coop. 91; *Bonner v. Johnston*, 1 Mer. 366.

<sup>4</sup> *Fox v. Birch*, 1 Mer. 105.

<sup>5</sup> *Cutler v. Simons*, 2 Mer. 103; *Bramley v. Teal*, 3 Mad. 219; *Gell v. Watson*, ib. 225.

<sup>6</sup> *Tindal v. Cobham*, 2 M. & K. 385.

<sup>7</sup> *Benson v. Glastonbury, N. & C. Com. C. Coop.* 42, this seems to be the point of the case.

The principle of ordering money into Court upon a trust by implication, was acted upon by Sir L. Shadwell in *Parry v. Ashley*,<sup>1</sup> where his Honor directed the proceeds of a policy of four lives, upon a freehold house, which had been renewed by an executrix after the death of a testator, to be brought into Court, on the application of the widow in a suit instituted by her for the administration of the testator's estate; not on the ground that the proceeds of the policy formed part of the personal estate, but because they were affected with a trust for the benefit of the persons interested in the real estate under the will.

The practice of the Court with regard to compelling the payment into Court of money constituting partnership property, has been stated by Mr. Collyer, in his *Treatise on the Law of Partnership*,<sup>2</sup> in the following manner.

As the rule is, that he who seeks equity must do equity, it seems clear that where the plaintiff is a private debtor to the partnership, he cannot insist upon an account without paying the amount of his debt into Court. Thus, in an early case, it is laid down that if one partner borrows any money out of the partnership trade, his own share shall be answerable for it, and he shall not be permitted to come into Equity and pray an account without making satisfaction for the debt.<sup>3</sup> Upon similar principles it should seem, that if the defendant swears by his answer that a specific sum is due from the plaintiff to the partnership as a private debt, that sum must be paid into Court by the plaintiff before an account will be decreed.

But one partner, whether plaintiff or defendant, may receive *partnership* money and effects, and insist on not paying in the amount unless all the other partners will pay in what they have in their hands,<sup>4</sup> and *à fortiori*, if a partner *as partner* receives money belonging to the firm, and, admitting that he has received it, insists that there is a balance in his favor, there is no pretence for making him pay it in.<sup>5</sup> If, however, a partner has received partnership money, under circumstances from which you can infer that

<sup>1</sup> 3 Sim. 97.

<sup>2</sup> Page 165, 5th Am. ed. § 301, 302.

<sup>3</sup> Vin. Abr. Partners, (E.), 5; *Meliorucchi v. Royal Exchange Assurance Company*, 1 Eq. Ca. Abr. 8; and see *Gold v. Canham*, 2 Swanst. 325; 1 C. C. 311.

<sup>4</sup> *Foster v. Donald*, 1 Jac. & W. 253.

<sup>5</sup> *Ibid.* 252.

he had agreed not to receive it, and that his receiving it was contrary to good faith, then he may be ordered to bring it into Court.<sup>1</sup>

The subject was fully discussed by Lord Cottenham in his judgment in *Richardson v. The Bank of England*.<sup>2</sup> The principles of the Court with regard to ordering the payment into Court of money by one partner at the instance of another partner were clearly laid down, and the result is, that, in ordering money into Court, in cases where it is in the hands of stakeholders, factors or trustees, who do not claim any title to it, the Court does not disturb the possession of any party claiming title, or direct a payment before his liability to pay is established.

It is to be remarked, that although the Court will order trust-money, admitted to be in the hands of a party, to be paid in to the name of the Accountant-General, on interlocutory application, it will not order interest upon such money to be so paid.<sup>3</sup> The only case in which the Court appears to have acted in opposition to this rule is that of *Freeman v. Fairlie*,<sup>4</sup> but that was under peculiar circumstances, the defendant having, by his answer, admitted that he had made interest to a larger amount than the sum he was ordered to pay in.

The same principles which apply to trust-moneys, and will induce the Court to order them to be paid into the Bank to the credit of the cause, will be acted upon in the case of trust-stock, or trust-money invested in exchequer bills, which the Court will order the party holding to transfer into the name of the Accountant-General in trust, in the cause, or deposit in the Bank to the credit of the cause. The Court will also, wherever it may be necessary for their protection, order specific chattels to be deposited in the Bank with the privity of the Accountant-General.

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A payment of money into Court upon an interlocutory application does not alter the rights of the parties interested in the fund ; — therefore, if an executor or administrator pays into Court money which he has received from the estate of the deceased, his

<sup>1</sup> *Foster v. Donald, ubi supra.*

<sup>2</sup> 4 M. & C. 165.

<sup>3</sup> *Wood v. Downes*, 1 V. & B. 50.

<sup>4</sup> Cited *ibid.* 3 Mer. 29.

right to retain a debt due to him from the deceased is not prejudiced,<sup>1</sup> and where the fund in Court is insufficient to discharge the administrator's debt, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied.<sup>2</sup>

It is said, in *Bencraft v. Rich*,<sup>3</sup> that funds belonging to wards of the Court cannot be transferred into the name of the Accountant-General to the credit of the cause, until the account has been taken by the Master, and his report made ;—this, however, must be understood as meaning merely, not that such a transfer cannot be made, but that it will not operate as a discharge to the trustees until they have passed their accounts.<sup>4</sup>

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## SECTION II.

### *Application for.*

WHEN it is said, that where a Court of Equity traces out trust-money in the hands of a person who has not *primâ facie* a right to hold it, that money must be brought into Court,<sup>5</sup> the *dictum* must be understood as implying that the person applying to have it brought in must have an interest in its protection.

The general rule may be stated thus, that the plaintiffs must be solely entitled to the fund, or have acquired in the whole fund such an interest, together with others, even though they

<sup>1</sup> *Langton v. Higgs*, 5 Simm. 229. The only instance in which the payment into Court will affect the right of the parties, is where money due to a wife is paid into Court in a suit to which the husband and wife are parties, which will have the effect of depriving the wife of her right by survivorship, unless the payments be into the joint names of the husband and wife. *Laprimandaye v. Teissier*, 12 Beav. 206.

<sup>2</sup> *Chissum v. Dewes*, 5 Russ. 29, ante, p. 1500. Where the amount of the Master's report against a defendant is ordered, for security, to be brought into Court, and invested in stock, pending exceptions by the plaintiff, any gain or loss, which may ultimately accrue on the sale of the stock, is to be received or borne by the defendant. *Clarkson v. Depeyster*, 1 Hopk. 505. The payment into Court is a collateral security, and is not to be taken as a payment to the plaintiff. *Ib.*

<sup>3</sup> 1 Bro. C. C. 56.

<sup>4</sup> See *ibid.* Belt's edition, n. (1).

<sup>5</sup> *Ante.*

are not before the Court, as entitles them on their own behalf and the behalf of those others to have the funds secured in Court.<sup>1</sup>

It is to be noticed, that the party applying must show an actual title to the property intended to be secured, or some part of it, either in possession or reversion, and that a probability of title will not be sufficient; therefore, although the Court will appoint a Receiver of personal estate, on account of the pendency of a suit in the Ecclesiastical Court to recall the probate of a will, it will not, on that account alone, order the executor named in such will to pay into Court money in his hands belonging to the deceased's estate.<sup>2</sup>

Applications for payment of money into Court should be made by special motion, of which notice must be given, and they have been commonly made after the answer has come in; but they are not unfrequently made after decree upon admissions in proceedings under the decree, and may in some cases be made before answer.

To support an application for the payment of money into Court, it has hitherto always been necessary that there should be a clear admission, by the answer, of the plaintiff's title; therefore, where the defendant by his answer merely says he did not know, and could not set forth as to his belief or otherwise, whether the plaintiff sustained the character he assumes, an order was not to be made.<sup>3</sup>

The answer is not now in every suit a matter of course as it was in former times, but the principle that the Court will not order money into Court upon an interlocutory application, except upon a clear admission on the part of the defendant, will probably continue, though that admission may probably, not necessarily, be contained in the defendant's answer.

The plaintiff was never allowed to make use of affidavits to supply any defect in the answer, the rule of the Court being, that

<sup>1</sup> *Freeman v. Fairlie*, 3 Mer. 29; *Wilton v. Hill*, 2 De G., Mac. & Gor. 807.

<sup>2</sup> *Reed v. Harris*, 7 Sim. 639. This, however, appears to be somewhat at variance with the order of Lord Hardwicke, in *Montgomery v. Clarke*, 2 Atk. 379; in which, under circumstances in some respects similar, he made an order upon one of the executors to pay in the balance in his hands. The order, however, of his Lordship was followed in *Edwards v. Edwards*, 10 Hare, App. 63. It seems that a contingent interest is sufficient. *Ross v. Ross*, 12 Beav. 89.

<sup>3</sup> *Dubless v. Flint*, 4 M. & C. 502; but see *Farrer v. Hutchinson*, 3 Y. & C. 706, Exch. Rep.

the order shall be made upon the defendant's admissions alone.<sup>1</sup> This rule, however, must be understood as applying to proof of the plaintiff's title ; for it has frequently been decided, that though the Court will not, upon application of this sort, allow affidavits to be read in support of the plaintiff's title, it will receive affidavits to verify collateral facts ; thus, upon a motion that a purchaser may pay his purchase-money into Court, it will allow affidavits to be read to prove that he has exercised acts of ownership.<sup>2</sup>

As the Court will not order money into Court where there is no admission of the plaintiff's right, still less will it do so where it is denied by the answer ; therefore, if a bill be filed stating a settled account, and by the answer it is denied that the account is just, the plaintiff cannot move that the defendant may pay into Court the money on the account so admitted, as he might if the account were admitted to be correct.<sup>3</sup>

If the admission is contained in schedules not cast up, the sums may be cast up, and, on affidavit of the amount of what appears to be due, the order will be made.<sup>4</sup>

It is to be observed, however, that in such cases it is the answer only that is to be relied upon, and thus no affidavit can be used in support of the application, except that of a calculator or accountant who examines the schedule annexed to the answer, and swears to the amount in the hands of the executor appearing therefrom.<sup>5</sup>

If the case is more complicated than that, and the question is, what is the result of that more complicated account ? that cannot be the foundation of a motion for paying in the money.<sup>6</sup>

And it is to be observed, that as the motion must be founded on an admission in the answer, it is necessary, where the application is made to order payment upon an account appearing in a book, the book must be referred to in such a way as to make it part of

<sup>1</sup> *Black v. Creighton*, 2 Moll. 554 ; *Clarkson v. Depeyster*, 1 Hopk. 274.

<sup>2</sup> *Bradshaw v. Bradshaw*, 2 Mer. 492 ; *Crutchley v. Jerningham*, *ibid.* 502.

<sup>3</sup> — *v. Bailey*, 30th July, 1805 ; 2 Mad. C. P. Ed. 1837, 523 ; see, also, *Richardson v. The Bank of England*, 4 M. & C. 177.

<sup>4</sup> *Mills v. Hanson*, 8 Ves. 68 ; *Quarrell v. Beckford*, 14 Ves. 178.

<sup>5</sup> *Black v. Creighton*, *ubi supra* ; see, also, *Richardson v. The Bank of England*, 4 M. & C. 165, 177, in which the principles upon which money is ordered into Court upon a defendant's admission is very fully reviewed ; and see *Isaacs v. Weatherstone*, 10 Hare, App. 30.

<sup>6</sup> *Mills v. Hanson*, *ubi supra*.

the answer or schedule;<sup>1</sup> and where the defendant has referred to several books, it will not be sufficient to make the application upon the casting up of some of the books, it must be the result of *all the books*.<sup>2</sup>

The same indulgence which is allowed to a plaintiff of verifying the amount of the balance admitted by the answer, will, in certain cases, be extended to the defendant; and where an executor admits, in his answer, that he has received a specific sum belonging to the testator's estate, but adds that he has made payments on account of the estate, the amount of which he does not specify, the Court will allow him to verify the amount of his payments by affidavit, and then will order him to pay the balance into Court.<sup>3</sup>

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Before leaving this branch of the subject, it is desirable to state the manner in which orders for the payment of money, the transfer of stock, or the delivery of specific articles into Court, are practically carried into effect. The Governor and Company of the Bank of England have the general custody of the effects of the suitors, as the bankers of the Court of Chancery. This property consists of cash, stocks, Exchequer bills, India bonds, shares in public companies, and specific articles deposited. Of these effects stock stands in the name of the Accountant-General in the books of the Bank, in trust in the particular cause to which it belongs. Other effects are placed in the Bank to the credit of the cause or matter in which they are directed to be paid in or deposited. The Accountant-General does not himself receive any of the money or effects of the suitors of the Court; but they are placed in the Bank of England, with which he keeps an account, according to the several causes and matters to which such money and effects severally belong.

No money or effects of any kind can ever be paid into the Bank in the name of the Accountant-General in any cause, unless an order for that purpose has been obtained from the Court upon the application either of the person desirous of paying the money in, or of some party desirous of enforcing the payment.

When, however, money is paid in under the authority of an Act

<sup>1</sup> Ibid., *Roe v. Gudgeon*, Coop. 304.

<sup>2</sup> *Mills v. Hanson*, *ubi supra*.

<sup>3</sup> Anon. 4 Sim. 359.

## 1832 PAYMENT OF MONEY AND TRANSFER OF STOCK INTO COURT.

of Parliament containing express directions for that purpose, a previous order of the Court is, as we shall hereafter see, unnecessary.<sup>1</sup>

When an order for the payment of money into Court has been obtained, the party desirous of complying therewith must, after the order has been duly passed and entered, leave either the original order or a Registrar's office copy thereof with the clerk of the Accountant-General in whose division the cause is.<sup>2</sup>

For each sum of money to be received by the Bank, the Accountant-General signs a direction mentioning the order, report or Act of Parliament, under the authority of which the person named in these is to pay the sum therein specified, and ordering it to be placed to his account as Accountant-General, to the credit of the particular cause or account mentioned. When the party paying in the money, or his solicitor, brings in to the Accountant-General's office a receipt from the Bank of such payment having been made, the Accountant-General signs a certificate of such payment and annexes it to the Bank receipt for the purpose of being entered in the Report Office.<sup>3</sup>

For each amount of stock directed by any order of the Court to be transferred into the name of the Accountant-General, application is made to the first clerk in the office for a ticket or notification specifying the amount of the stock to be transferred, and the cause or account to which it is to be placed when such transfer is made; the Accountant-General accepts the stock, and signs a certificate to the Bank of his having made such acceptance. Of this transfer of stock there is a certificate sent from the Bank, or such other office where the stock may be, to the Accountant-General's office, and the Accountant-General signs another certificate of such transfer, and of his acceptance of the stock, and annexes it to the certificate from the Bank or such other office where the stock may be, for the purpose of being entered and filed in the Report Office, from whence the party may procure an office copy of these certificates.

For each parcel of Exchequer bills or India bonds, and for each package containing specific articles, directed by any order of the

<sup>1</sup> See post, Chapter on the Statutory Jurisdiction of the Court.

<sup>2</sup> The Accountant-General will not act upon the minutes of the order, or upon a Report Office copy thereof, unless under very special circumstances.

<sup>3</sup> See *Foley v. Smith*, 13 Beav. 113.

Court to be deposited in the Bank in the name of the Accountant-General, he signs a direction for the person named in such order to make such deposit in the Bank, in his name, and to what cause or account it is to be placed. When the party or his solicitor brings into the Accountant-General's office a certificate from the Bank that such deposit has been made, the Accountant-General signs another certificate that such deposit has been made in the Bank, and annexes it to the Bank certificate for the purpose of being entered and filed in the Report Office.

When cash has been paid into Court, it cannot be invested by the Accountant-General without an order authorizing it. Usually, when the order for payment is obtained, application is made by the plaintiff, or party interested in the money, that a direction be inserted in the order for the investment of the money when paid in. If the sum be large,<sup>1</sup> or if it be likely to remain in Court for some time without any person being entitled to the dividends or interest accruing due upon it, application should be made that the interest and dividends upon it should be invested also.<sup>2</sup> In cases where money is paid into the Bank without an order of the Court, or where, upon the order being obtained, no direction for investment or accumulation is added, a separate application for either of these purposes may be made. The rule of the Court is, that all money in Court shall be laid out in Bank 3 per Cent Annuities; possibly, however, the recent stat. 7 & 8 Vict. c. 5, by which the 3*l.* 10*s.* per cent stock was converted into 3*l.* 5*s.* per cent annuities, may make an alteration in this respect, inasmuch as this stock is in some respects now the more permanent of the two. Where money is paid in under an Act, the statute itself frequently prescribes the securities in which it may be invested. The dividends and interest of the several stocks, India bonds and other securities, are received by the Bank as they become due, under a power of attorney from the Accountant-General, and placed to the credit of the causes and accounts to which they respectively belong; the Bank sends quarterly to the Accountant-General's office a book called the dividend book, signed by an officer of the Bank,

<sup>1</sup> If the sum is very large, the order ought to direct that the money be laid out in portions, as was done in the case of the London and York Railway, where the sum was 250,000*l.*, and it was directed to be laid out in the purchase of Exchequer bills in parcels of 50,000*l.* each. 11 Reg. Lib. 1844, B. f. 389.

<sup>2</sup> Seton, p. 33.

which book, containing the amount of the securities and interest moneys belonging to each cause and account, is countersigned by the Accountant-General, and entered and filed at the Report Office.

The 28th Order of 1833 prescribes the form in which the orders are to be drawn up by the Registrars, upon which the Accountant-General acts. The effect of it is, that in all orders for payment or delivery in or out of the Bank, or for investment or transfer of moneys or effects, the exact sum shall be ascertained by the Registrar, and specified in the order in words written at length: — “Except in the case of residues of money or securities remaining after a portion directed to be applied for particular purposes, the amount of which cannot be ascertained at the time of making the said order, in which cases the order shall direct that the amount of such residues, and shares of residues, shall be ascertained and specified by affidavit.”

The Order also provides that both the persons to pay in, and also the persons to receive, under an order, shall be described by name, and their names and titles written at length, except in the case of bodies corporate, companies or societies, and not merely as plaintiffs, or petitioners, or the like.

It also directs, that in all orders directing the payment of dividends and annuities, the time when the first of such payments shall be made, and when all subsequent periodical payments, whether quarterly, half-yearly, yearly or otherwise, shall be specified and expressed in words at length. That all orders directing the laying out of sums of money of uncertain amount in the purchase of securities, do direct that such investments shall be made when the money shall amount to a competent sum, and not sooner.

The remainder of the Order relates to different cases where a reference has been made to apportion moneys or securities, and provides that the amount shall be ascertained and stated in the report in words at length: — “Except in the case of residue of money or securities remaining after a portion directed to be applied to certain purposes, and the amount of which portions cannot be ascertained at the time of making such report, in which case the amount of such residue and portions shall be ascertained by affidavit.” It also directs in such cases that the names of the persons to pay and receive shall be written at full length.

The order for the payment of money, transfer of stock or delivery of effects into Court, ought to state a time within which it is to be complied with.<sup>1</sup> If such a direction be omitted, the decree is not thereby rendered ineffectual, but the Court will, upon motion for that purpose, fix a time for the performance of the act.<sup>2</sup> The order having been duly passed and entered, a copy thereof endorsed according to the 12th Order of August, 1841, must be personally served<sup>3</sup> upon the party to make the payment before the expiration of the period limited by the order for that purpose. If such service cannot be effected within this time, a motion must be made that the party may pay in the money within a further period stated by the notice of motion. At the expiration of the period limited by the order, upon an affidavit of personal service, and a certificate of the Accountant-General that the money has not been paid in, an attachment may be issued against the party making default.<sup>4</sup> If the party to pay in the money be a peer, or person entitled to the privilege of Parliament, the practice seems to be that upon his making default after due personal service upon him of a copy of the order, a motion is made for a sequestration *nisi*, and in the event of the money not being then paid, an order absolute may be obtained.<sup>5</sup>

Lastly, it may be observed, that the office of the Accountant-General was created by stat. 12 Geo. I. c. 32, and that the provisions of that Act still regulate, in many respects, the practice in his office.

<sup>1</sup> 11th and 12th Orders, August, 1841.

<sup>2</sup> *Needham v. Needham*, 1 Hare, 633.

<sup>3</sup> Substituted service has, however, been allowed. See *Skegg v. Simpson*, 2 De G. & Sm. 456, and ante, pp. 1059, 1060.

<sup>4</sup> Ante, p. 453.

<sup>5</sup> *Crawley v. Clarke*, 3 Bro. 373.

## CHAPTER XLII.

## THE PAYMENT OF MONEY OR TRANSFER OF STOCK OUT OF COURT.

WHEN in the progress of a cause money has been paid, stock transferred, or specific articles deposited in Court, the decree at the original hearing or upon further directions frequently provides for the payment, transfer, or delivery of the same to the parties then entitled thereto. It however often happens that the rights of the parties to the effects in Court, at the time when the decree is made, are not such as to enable the Court then to make an order for absolute payment, or delivery to them. Under such circumstances, where it appears by the certificate of the chief clerk that a certain proportion of the fund in Court, or a precise sum, belongs to any particular party or set of defendants, then if there is any incumbrance affecting such share, or if the interest in it is delayed until the happening of some event, as for instance, till the party attain the age of twenty-one, or till the death of a previous tenant for life, the Court will, on the hearing, order the share to be carried over in trust in the cause to a separate account. The effect of which is, that, on the person entitled to this share subsequently applying for payment, it will not be requisite to serve any of the parties to the cause with notice of the application.<sup>1</sup>

In such a case the decree contains a direction that the parties shall have liberty to apply, so that when the interest in the share has become absolute, the person entitled thereto may apply for payment by petition. Formerly, when the money had been carried to a separate account, and the title to it was clear, an order for payment might have been obtained by motion,<sup>2</sup> but this is not the present practice.<sup>3</sup>

Unless, upon the hearing of a petition of this kind, the title of the petitioner to the immediate payment of the fund is made clear

<sup>1</sup> *Re Jervoise*, 12 Beav. 209. See *Ex parte Van Vorst*, 1 Green Ch. 292.

<sup>2</sup> Where money is placed in the hands of the receiver pending the litigation, the Court may, on the decision of the cause, direct its application on motion. *Bank of Mobile v. Planters' & Merchants' Bank*, 1 Ala. 109.

<sup>3</sup> *Heathcote v. Edwards*, 3 Jac. 504; *Garratt v. Niblock*, 5 Beav. 103; see, however, *Oliver v. Burt*, 1 Beav. 583; *Heathcote v. Edwards*, Jac. 504, where, under peculiar circumstances, orders have been made on motion. See *Ex parte Van Vorst*, 1 Green Ch. 292.

by the proceedings in the cause, or by the previous orders of the Court, the petition must be supported by evidence of all the facts necessary to establish the title. The evidence is generally given by affidavit, but it will be recollected that either the petitioners or the respondents may avail themselves of the provisions of the 40th section of the Chancery Improvement Act.<sup>1</sup> Application should also be made, previously to preparing the petition, to the Accountant-General, for a certificate of the amount of the fund sought to be affected, as well for the purpose of stating correctly the items in the petition, and the accounts to which they stand, as also for the sake of ascertaining whether it is affected by any stop order. Moreover, it is absolutely necessary that this certificate should be left with the Registrar when the order made upon the petition is bespoken.<sup>2</sup>

As a general rule, upon the presentation of a petition of this kind, the Court will not make an order for payment to any person except the person or persons entitled to the money. Where, however, the fund is small in amount, or has to be divided amongst so many that the share of each would be small,<sup>3</sup> and consequently the expense of separate orders and powers of attorney would be important, the Court has ordered payment to the solicitor upon his undertaking to distribute the fund among the petitioners.

In the case of *Kelsall v. Minton*,<sup>4</sup> Lord Langdale, M. R., said, "that the rule which he had adopted, and which must be followed on that occasion, was not to make any such order unless the petition praying for payment to the solicitor was signed by the parties, or unless a written authority was produced, signed by the parties, stating that they were desirous that their money should be paid to the solicitor."<sup>5</sup>

<sup>1</sup> Ante, p. 895.

<sup>2</sup> In all cases of special applications for orders to pay out money brought into Court, the party applying must produce the certificate of the registrar or clerk, with whom the money was deposited, showing the amount of the fund, and the way in which it is invested, and the claims, if any, which have been made thereon, so that an order may be entered to enable the applicant to obtain the fund. *Hulbert v. McKay*, 8 Paige, 652.

<sup>3</sup> Not exceeding 10*l.*; see *Brundling v. Humble*, Jac. 48.

<sup>4</sup> 2 Beav. 361; see, also, *Armstrong v. Stockham*, 11 Jur. 97; *Ex parte De Beaumont*, 13 Jur. 354; see, also, *In re Morison*, 16 Sim. 42, where the funds of an infant were paid to the solicitor to be remitted to the guardian.

<sup>5</sup> Where the fund was clear, and the rights of the respective parties ascertain-

It is only when the amount of the fund is small that the general rule is relaxed by allowing the solicitor to receive the fund without a power of attorney; but where a regular power of attorney, authorizing a particular person specifically to receive the fund in question, has been duly executed, it seems that, however large the amount, the Court will, upon proof of the due execution of the power, and that the same is still in force, order payment to the person so authorized.<sup>1</sup> In such a case perhaps, strictly, the petition ought to be by the attorney as well as by the party. In the case of *The Marquis of Hertford v. The Earl of Lonsdale*,<sup>2</sup> Lord Langdale, M. R., ordered payment to a solicitor fully authorized by a power of attorney from the legatee where the amount was little short of 100,000*l*. In this case the petition was supported by an affidavit of the due execution of the power, and that it was still in force. The power itself was so worded as that it did not become inoperative immediately upon the death of the party. The order did not affect any funds in Court in the cause; but directed the executors to pay the sum in question out of the assets in their hands, they neither opposing nor consenting to the application.

There is a case of *Carr v. Estabrooke*,<sup>3</sup> where a legacy of 100*l*. was ordered to be paid to a person having a general power of attorney from the legatee, without any power authorizing him to receive this legacy specifically. In this case, however, the circumstances disclosed by the affidavits were special, and it seems doubtful whether the authority would be followed except under like circumstances. When an order for payment has been made to the party himself, it is the ordinary practice for the Accountant-

ed, the Court directed, pending the account, a part of the money to be paid to the solicitor of infant plaintiffs, towards further defraying the past and future expenses of the suit, and the interest on the residue of the portion coming to such infants, to be paid, as it accrued, to their mother, for their necessary maintenance and education. *Meth. Epis. Church v. Jaques*, 3 John. Ch. 1.

<sup>1</sup> *Hill v. Chapman*, 11 Ves. 239. Money may, upon the production of the proper vouchers, be paid out of Court to the attorney in fact of the party. *Hoge v. Penn*, 1 Bland, 40. But it will not be paid out to a guardian *ad litem* of an infant party. *Corrie v. Clarke*, 1 Bland, 85. After a sale to effect a division, however, the share awarded to the infant may be paid to the mother, on her giving bond to account as guardian. *Spurrier v. Spurrier*, 1 Bland, 477.

<sup>2</sup> 14th January, 1846, *ex relatione* Mr. Tripp; *Fell v. Jones*, 17 Beav. 521.

<sup>3</sup> 2 Cox, 390.

General to make the payment to persons authorized by power of attorney.<sup>1</sup>

If the order is made for the payment to the party himself, or his personal representative, then, in the event of the death of the party before payment has been made, the Accountant-General will receive the probate of the will as proof of the death, and will pay the personal representative.<sup>2</sup>

In the case of *Moody v. Bainbridge*,<sup>3</sup> such an order was made for payment to a party, or his personal representatives, of a legacy; he died, leaving an executrix and two executors; the executrix died, thereupon the Accountant-General refused to pay the legacy under a power of attorney from the surviving co-executors without a discharge from the executor of the deceased executrix. On an application to the Court, an order was made to pay the legacy to the surviving executors. If, however, the order is made for payment to a party without introducing the words "or his personal representatives," or words of similar effect, the Accountant-General will not act upon the order after the death of the party, but an application to the Court will be necessary.<sup>4</sup>

It has been already stated in what cases a prerogative probate is necessary;<sup>5</sup> the practice used to be, where the sum did not exceed 30*l.*, for the Accountant-General to pay to a personal representative under a provincial probate.

A considerable interval of time frequently occurs after the hearing of a cause before any person acquires such an interest in the fund in Court, as to be entitled to obtain an order for payment. In many cases, therefore, when the period arrives, the cause will have become abated. It seems, however, clear, that the mere abatement of the suit will not be considered a reason for refusing to pay money out of Court to persons whose rights to the money arise out of the decree.<sup>6</sup>

Another instance in which the Court used to order money to be

<sup>1</sup> For the mode in which such powers must be executed and verified, see *Hutcheon v. Mannington*, 6 Ves. 823; *Lord Kinnauld v. Lady Saltoun*, 1 Mad. 227; *Garvey v. Hibbert*, 1 J. & W. 180.

<sup>2</sup> *Clayton v. Gresham*, 10 Ves. 288.

<sup>3</sup> 6 Mad. 107.

<sup>4</sup> *Gates v. Gates*, 12 Jur. 510, where a decree was varied.

<sup>5</sup> Ante, p. 325.

<sup>6</sup> *Finch v. Lord Winchelsea*, Mich. 1727, Eq. Ca. Ab. 2; *Roundell v. Curren*, 6 Ves, 250; see also *Lord Shipbrooke v. Lord Hinchbrook*, 13 Ves. 387.

paid over to a separate account occurred when the party entitled to it was a married woman. In such a case the practice was, notwithstanding her interest in the fund was immediate, for the Court not on decree to order payment at once, but to direct that the fund be carried to the account of her and her husband.<sup>1</sup> After the fund had been thus transferred, a petition was presented by the husband and wife, or such a petition came on together with the cause on further directions. The present practice, however, is different, and has been stated in a former part of this work.<sup>2</sup>

When any sum or stock is directed by any order to be carried over from one cause to another, the Accountant-General signs a certificate to the Bank, directing such sum of cash or stock, in a particular cause or account, to be carried over to some other cause or account, mentioning the order under the authority of which such carrying over is directed; the Bank then sends a certificate to the Accountant-General's office of such carrying over having been made; the Accountant-General then signs another certificate of such carrying over, which is annexed to the Bank certificate for the purpose of being entered and filed in the Report Office.

There are some cases where, although the interest of a party in the fund is not absolute but subject to a contingency, the Court has ordered payment of the money, the contingency being remote, and the parties receiving the money entering into a recognizance to refund it in the event of the happening of the contingency; this was done in the case of *Leng v. Hodges*,<sup>3</sup> where the right of the parties was subject to the contingency of a female who was then of the age of fifty-five years, and unmarried, having children.

In the case of *Brown v. Pringle*,<sup>4</sup> a legacy to a woman for life, with remainder to her children, was paid out of Court on the petition of the mother and children, the children having attained twenty-one, and the mother being sixty-six years of age. In this case, the fund being small and the contingency remote, Sir J. Wigram, V. C., only ordered the parties to undertake to account for it as the Court should direct in case of other children being born, and no recognizances were entered into.

<sup>1</sup> *Campbell v. Harding*, 6 Sim. 283.

<sup>2</sup> Ante, p. 91.

<sup>3</sup> *Jacob*, 585; see also *Deffliss v. Goldschmit*, 19 Ves. 566; and *Payne v. Long*, cited 19 Ves. 571.

<sup>4</sup> 4 Hare, 124; *Webber v. Webber*, 1 Sim. & Stuart, 313; *Dowley v. Wingfield*, 14 Sim. 277; *Cuthbert v. Purrier*, 2 Phil. 200.

Having considered the circumstances under which an order for payment of money out of Court may be obtained, it remains to state the manner in which orders are carried into effect. In the first place, the order must be duly passed and entered, and left with the Accountant-General, who will not act upon a Report Office copy thereof, or a Registrar's Office copy, unless an affidavit is produced to him that the original is lost and cannot be found. On bespeaking the minutes of an order, dealing with any fund in Court, the Accountant-General's certificate and the restraining order (if any), or an office copy thereof, must be left with the Registrar's clerk. So, also, when payment out of Court is ordered to an executor, the probate must be left.

For each sum of money directed to be paid out, the Accountant-General draws on the Bank by a note, or check under his hand, entitled in the particular cause or account out of which the money is to be paid; this note is entered at the Report Office, and marked, and until recently was countersigned by one of the Registrars of the Court. Now, by the 34th sect. of 15 & 16 Vict. c. 87, the duty relating to the countersigning of notes and checks is to be performed by the Master of Reports and Entries, or the Registrars of the Court. If the money for which such note is drawn is not for interest or maintenance, the Accountant-General signs a certificate of such note, which certificate is entered and marked at the Report Office.

At the foot of the note or check there is a proviso, that if not paid within a month it is void: accordingly, where a check was alleged to have been accidentally destroyed, the Court, though not satisfied with the evidence of its destruction, directed a new check to issue, as the former being out of time would not have been paid if presented.<sup>1</sup>

When any stock is by any order directed to be transferred, or when any stock, Exchequer bills or India bonds, are by any order directed to be sold; or when any India bonds, Exchequer bills or specific articles in packages, are by any order directed to be delivered out, the party, or his solicitor, brings to the Accountant-General's office a certificate from one of the Registrars of the Court of what stock is to be transferred, and to whom; or of the stock, bills, or bonds to be sold, and to what amount; or of the bills,

<sup>1</sup> Taylor v. Scrivens, 1 Beav. 571. The Accountant-General requires an affidavit of the loss of the check, and of the lapse of time.

bonds or specific things in packages to be delivered out, and to whom, and from what cause or account.

In transfers or sales of stock, the Accountant-General sends to the Bank the Registrar's certificate authorizing the transfer or sale, which is retained by the Bank as their authority for permitting the transfer to be made: he then signs a certificate of his having made such transfer, and of the cause or account from which the same is made, and the amount for which the same was sold, to be filed in the Report Office. In sales of stock the Accountant-General also signs a certificate of the stock sold, and the money raised by such sale.

On sales of Exchequer bills, or India bonds, the Registrar's certificate is countersigned by the Accountant-General, who, after having received from the Bank a certificate of the particular bills or bonds sold, the amount of the money raised, and the cause or account in which the sale is made, signs another certificate of the particulars of such sale, and annexes it to the Bank certificate, to be filed in the Report Office.

When Exchequer bills and such other things as before mentioned are delivered out, the Registrar's certificate is countersigned by the Accountant-General and sent to the Bank; and the Bank having sent to the Accountant-General a certificate of the particulars of such bills, and other things delivered out, and to whom, and from what cause or account, the Accountant-General signs another certificate of such delivery, and annexes it to the Bank certificate, to be filed in the Report Office.

Formerly, when any Exchequer bills were paid off or exchanged, it was necessary that the order to receive the principal and interest, and a request that the principal and interest due on the bills might be received, or that the Exchequer bills might be exchanged, should have been left at the Accountant-General's office. The omission to give such directions caused considerable loss by reason of the interest upon the bills ceasing. Accordingly, by a General Order of the 28th August, 1828,<sup>1</sup> the Bank is now enabled to receive the interest upon Exchequer bills, and exchange the same for new bills, in case such new bills are issued, or to receive the principal and interest due on such bills as cannot be exchanged without any direction from the Accountant-General, and in such case the Bank is to certify to the Accountant-General without any

<sup>1</sup> Orders by G. W. Sanders, vol. i. p. 735.

direction from him for that purpose, the numbers, dates and sums of the Exchequer bills so exchanged or paid off, and the causes and accounts to which they were respectively placed, and also the numbers, dates, and sums of the new bills taken in exchange, and the amount of the interest, or principal and interest (as the case may be) received on each bill or set of bills, placed to the same cause, matter or account.

In conclusion it may be convenient here to observe, that when an order for payment of money out of Court has been made, an appeal will not stop the execution of the order ; but from the case of *Ferguson v. Tadman*,<sup>1</sup> it appears that the Accountant-General is justified in not complying with an order for payment until there has been sufficient time for the appellant to make a special application for a stay of proceedings to the Court below.

The Registrar, in drawing up any decree or order, whereby the Accountant-General shall be directed to pay or transfer any fund or part of any fund in respect of which legacy or succession duty is payable, shall, unless the decree or order provide for the payment of the duty, direct the Accountant-General to have regard to the circumstance that such duty is payable.<sup>2</sup> Moreover, by 16 & 17 Vict. c. 51, s. 53, in administration suits the Court is to provide out of any property which may be under control for the payment of duty to the Commissioners. The Accountant-General on receiving a notice under the last-mentioned Order is to require the production of the official receipt for the duty, or a certificate from the parties of the payment of the duty.

<sup>1</sup> 1 Russ. & M. 331.

<sup>2</sup> Order of 9th March, 1854.

## CHAPTER XLIII.

## THE STATUTORY JURISDICTION OF THE COURT.

SECTION I. — *Introduction.*

THIS work has been hitherto devoted to an investigation of that part of the practice which relates to the original jurisdiction of the Court of Chancery. This practice is, as we have seen, founded partly upon immemorial customs in the offices connected with the Court, partly upon the decisions of the Judges and the General Orders, and partly upon direct provisions made by Acts of Parliament. In many instances, where the legislature has conferred upon the Court additional means of enforcing its decrees and orders, the powers given for this object have been interwoven with the original practice. Such statutes have consequently been already stated, and need not be made the subject of further discussion. There are also other Acts of Parliament affecting in various ways the rights of property and the rules of Equity, and therefore incidentally controlling and modifying the jurisdiction in Chancery, but although the construction of these acts has frequently to be determined in Equity, they relate rather to the Law than the practice of the Court, and, therefore, they do not come within the scope of this work.

In modern times the number of statutes that have been passed, giving a particular direct jurisdiction, is so great, that it would be impossible to attempt to go through the whole of them ; but it will be convenient to state the general peculiarities of this part of the jurisdiction of the Court of Chancery, and to call attention to some of the most important of these statutes.

In the first place, with reference to the general statutory jurisdiction, there is this material distinction between the manner in which the original powers and remedies of the Court are called into operation, and the manner in which orders under these statutes are enforced, that in the former case it is, as we have seen, absolutely necessary, in almost all cases, that a bill should be filed and a suit regularly instituted before any relief can be obtained, whereas in the latter case, it is usual for the Act of Parliament

providing the additional remedy also to enact that it may be obtained in a summary manner upon petition ; but it should be recollected that the ordinary jurisdiction of the Court is not excluded, except by express enactment.<sup>1</sup> In all such cases, the petition should be entitled in the Act under which it is presented.<sup>2</sup> It should also be entitled in the matter of the particular person or estate to which it has reference.<sup>3</sup> The omission of this latter heading or title is often productive of great inconvenience and delay both to the parties and to the officers of the Court, and renders it extremely difficult to distinguish at any future period one petition from another that has been presented under the same Act.

If, as is usually the case, the Act enables the Lord Chancellor and the Master of the Rolls to make orders under it, the petition may be addressed to either of them ; but if addressed to the Lord Chancellor, it may be heard by any one of the Vice-Chancellors.<sup>4</sup>

There is, however, a material distinction with reference to the mode in which the orders are enforced, between regular suits depending in the Court, and matters concerning which summary jurisdiction exists.

It will be recollected that the 11th Order of August, 1841, provides as to orders made in suits, " That if any party who is by an order or decree ordered to pay money, or do any other act in a limited time, shall, after due service of such order, refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such order shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a serjeant-at-arms, and such other process as he hath hitherto been entitled to upon a return *non est inventus*, by the commissioners named in a commission of rebellion, issued for non-performance of a decree or order." The following Order, the 12th, provides, " that the order or decree shall state the time when the act is to be done, and sets forth the indorsement to be made on the order." <sup>5</sup>

This practice, however, does not apply to orders made under

<sup>1</sup> *Hyde v. Edwards*, 12 Beav. 160 ; and see *Thomas v. Walker*, 18 Beav. 521.

<sup>2</sup> *Ex parte Law*, 4 Beav. 510.

<sup>3</sup> Where the jurisdiction is conferred by the statute, and the property sought to be affected forms the subject-matter of a suit, the petition should be entitled both in the cause and under the Act.

<sup>4</sup> *Ex parte Taylor*, 10 Sim. 291.

<sup>5</sup> These two Orders were amended by the 6th Order of April, 1842, *ante*, p. 1061.

the statutory jurisdiction. Upon this subject it will be convenient to give an extract from the report of the Commissioners concerning the Court of Chancery, bearing date April, 1856. After stating to the effect aforesaid that the Orders of 1841 do not apply to matters in the Court under its summary jurisdiction, they go on to observe: "The consequence is, that the practice prevailing before the orders is still in force with respect to all such matters. These are very numerous, and some of them are of such a nature as to render the application of the old practice to them especially harassing and vexatious. The payment of money due from a solicitor to a client, or from the client to the solicitor, upon the taxation of the solicitor's bill, under the ordinary jurisdiction of the Court, cannot be enforced without several successive orders, and several successive services and demands. We think that the distinction between the mode of enforcing orders, according as they are made in suits or matters, should be abolished, and that the simpler practice adopted with respect to orders made in suits should be made applicable to orders made in matters." It is to be hoped that the recommendations of the Commissioners will before long be acted upon by the legislature; but, in the mean time, it is necessary to set out the effect of the distinction above alluded to.

The mode of enforcing payment of a solicitor's bill of costs against a client, after taxation, and certificate filed under the Solicitor's Act, 6 & 7 Vict. c. 73, is set forth in the evidence given before the Commissioners, and is as follows: —

"The order for taxation, obtained as of course by the client, contains a submission by him to pay, and a direction 'that the amount to be certified be paid accordingly by the party liable to pay such amount.'

"The taxation having been made, and the certificate of amount due from client to the solicitor having been filed, the following steps are necessary to enforce payment by committal: —

"1. The certificate of costs must be personally served, and demand made either in person or by attorney.

"2. Motion (supported by affidavit of personal service, and demand and refusal), that the client may pay within a given time.

"3. Motion (supported by affidavit of personal service of last order, demand and non-payment), that the client may pay the amount within four days or stand committed.

“4. Order as of course (obtained on motion supported by affidavit of personal service of last order, demand and non-payment), that the client do stand committed.

“Upon this order when drawn up the client is committed.

“The same process is necessary for the committal of the solicitor in the event of a balance being found due from him to the client.

“In proceeding to enforce payment by *fi. fa.* or *elegit* by the solicitor against the client: —

“The client having submitted to pay, and the usual order for taxation having been made, and the certificate of amount due from the client to the solicitor having been filed, the solicitor may obtain an order of course, obtained on petition, for the payment of the amount certified to be due; after which the solicitor may sue out a *fi. fa.* or *elegit* under 1st Order of 10th May, 1839.

“In proceeding to enforce payment by *fi. fa.* or *elegit* by the client against the solicitor: —

“The client must serve a notice of motion upon the solicitor, and obtain an order, that the amount certified to be due to him from the solicitor may be paid to him by the solicitor. After one month from the time of such order being passed and entered the client is entitled to sue out a writ of *fi. fa.*, &c.”

On the other hand, the mode of enforcing an order for payment made in a suit, is, as we have seen,<sup>1</sup> as follows: —

The party prosecuting such order, may, under the 11th and 12th Orders of 26th August, 1841, proceed to enforce the order in the following manner: —

“The order requiring payment must state a time within which the payment is to be made, which is served upon the party required to pay, and a memorandum indorsed, ‘If you, the within-named A. B., neglect to obey this order by the time therein limited, you will be liable to be arrested under a writ of attachment, &c.’

“The writ of attachment issues upon affidavit of personal service within due time, and of demand either in person or by attorney, and non-payment.”<sup>2</sup>

<sup>1</sup> Ante, p. 1059.

<sup>2</sup> These orders only apply to orders and decrees made in a suit. *In re Blake v. Young*, 9 Beav. 209.

## SECTION II.

*Statutes Relating to Charities.*

THE Court of Chancery has from a very early period exercised both an original and a statutory jurisdiction concerning charities. It would not be within our compass to enter fully into the nature of this jurisdiction and its gradual development, but the attention of the reader may be directed to the most important provisions of the recent Act on this subject, and its effect on the Court of Chancery. With respect to the original jurisdiction it does not seem very clear what portion of this jurisdiction of Chancery over charities was assumed previous to the statute 43d Eliz. c. 4, what portion of it arose from the power of the sovereign as *parens patriæ*, to institute proceeding by means of the Attorney-General on behalf of charities, and what portion of it is incidental to the general jurisdiction of the Court to enforce trusts of all descriptions.<sup>1</sup>

The statute 43 Eliz. c. 4,<sup>2</sup> commonly called the Statute of Charitable Uses, recites that "Lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty and her most noble progenitors, as well by sundry other well-disposed persons, some for the relief of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in Universities; some for the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; some for education and preferment of orphans; some for or towards relief, stock, or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief

<sup>1</sup> Upon this subject see Story Jur. vol. ii. p. 365, ch. 32, § 1142 *et seq.*

<sup>2</sup> The St. 43 Eliz. c. 4, relating to charitable gifts and uses, forms, in principle and substance, a part of the law of Massachusetts. *Going v. Emery*, 16 Pick. 107. So in North Carolina, Kentucky, Pennsylvania, and Indiana, *Griffin v. Graham*, 1 Hawks, 96; *Gass v. Wilhite*, 2 Dana, 170; *Witman v. Lex*, 17 Serg. & R. 88; *Mayor &c. Philadelphia v. Elliott*, 4 Rawle, 170; *McCord v. Ochiltree*, 8 Blackf. 15; *McAuley v. Wilson*, 1 Dev. (N. C.) Ch. 276. This statute is not in force in Virginia, or in Maryland. *Dashiell v. Attorney-General*, 5 Harr. & John. 392; *Gallego v. Attorney-General*, 3 Leigh, 450; *Baptist Asso. v. Hart*, 4 Wheat. 1; 1 Jarman Wills, (4th Am. ed.) 103, 243, in notes.

or redemption of prisoners or captives ; and for aid or ease of any poor inhabitants, concerning payments of fifteens, setting out of soldiers, and other taxes ; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless have not been employed according to the charitable intent of the givers and founders thereof by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same.”<sup>1</sup>

This statute has in almost all respects become obsolete ; but the words in the recital just quoted are still important, inasmuch as the Court, in determining what gifts come within its present charitable jurisdiction, has adopted the practice of being guided by this statute, and no bequests are deemed within the authority of Chancery, and capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable, or which by analogy are deemed within its spirit and intendment.<sup>2</sup>

Commissions under this Act for Charitable Uses fell into disuse, partly by their abuse, partly because they were found insufficient in prosecuting the claim in many instances, and also from being extremely unjust in many instances as to the persons called upon to account for property, or the persons sought to be charged thereby.<sup>3</sup> When the custom of issuing commissions concerning charities ceased, the only manner by which any remedy could be obtained in Chancery for their abuse was by way of information. Under these circumstances, the statute 52 Geo. III. c. 101, frequently called *Sir Samuel Romilly's Act*, was passed, which conferred upon the Court a valuable summary jurisdiction, and still

<sup>1</sup> By the Interpretation clause of the 16 & 17 Vict. c. 137, the word “charity” means every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purview or interpretation of the statute of the 43d of Elizabeth, c. 4, or as to which, or the administration of the revenues or property thereof, the Court of Chancery has or may exercise jurisdiction.

<sup>2</sup> *Kendall v. Granger*, 5 Beav. 300 ; *Attorney-General v. Corporation of Shrewsbury*, 6 Beav. 220 ; *Attorney-General v. Compton*, 1 Y. & C. 417. For a detailed account of the effect of this statute and the decisions under it, see *Duke's Law of Charitable Uses*, and *Shelford on Mortmain*, p. 276. The last occasion on which the Court acted upon this statute appears to have been the case of *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305.

<sup>3</sup> Lord Redesdale in *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 62.

continues in force, though the power of the Charity Commissioners will render it hereafter comparatively unimportant.

It will be convenient now to state the general result of the 16 & 17 Vict. c. 137, concerning charities, and to refer more particularly to the particular sections which affect the Court of Chancery. It may be stated, in the first instance, that the Act does not proceed upon the principle of transferring the jurisdiction of the Court of Chancery, although it provides redress in many cases by a simpler process than by recourse to that Court. Where, however, any proceeding is necessary for the purpose of charging the trustees of any charity with breach of duty or malversation of the fund, it appears that there is still no tribunal, except the Court of Chancery, to which an application can be made. So, also, where the rights of the charity have to be vindicated against persons who are not trustees, or there is a question of title to be tried between the charity or its trustees and adverse claimants, the jurisdiction of the Court remains as it formerly was.<sup>1</sup> With respect, however, to a charity once established, no application can be made to the Court except by leave of the Commissioners. For the 17th section of the 16 & 17 Vict. c. 137, enacts, that, "Before any suit, petition or other proceeding (not being an application in any suit or matter actually pending), for obtaining any relief, order or direction concerning or relating to any charity, or the estate, funds, property or income thereof, shall be commenced, presented or taken by any person whomsoever, there shall be transmitted by such person to the said Board notice in writing of such proposed suit, petition or proceeding, and such statement, information and particulars as may be requisite or proper, or may be required from time to time by the said Board, for explaining the nature and objects thereof; and the said Board, if upon consideration of the circumstances they so think fit, may, by an order or certificate, signed by their secretary, authorize or direct any suit, petition or other proceeding to be commenced, presented or taken with respect to such charity, either for the objects and in the manner specified or mentioned in such notice, or for such other objects and in such manner and form, and subject to such stipulations or provisions for securing the charity against liability to any costs or expenses, and to such other stipulations or provisions for the pro-

<sup>1</sup> 16 & 17 Vict. c. 137, ss. 15, 42; and see *Attorney-General v. Governors of Sherborne Grammar-School*, 18 Beav. 281, as to the jurisdiction of the Court.

tection or benefit of the charity, as the said Board may think proper ; and such Board, if it seem proper to them, may, by such order or certificate as aforesaid, require and direct that any proceeding so authorized by them in respect of any charity shall be delayed during such period as shall seem proper to and shall be directed by such Board ; and every such order or certificate may be in such form and may contain such statements and particulars as such Board shall think fit ; and (save as herein otherwise provided) no suit, petition or other proceeding for obtaining any such relief, order or direction as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said Board : Provided always, that this enactment shall not extend to or affect any such petition or proceeding, in which any person shall claim any property or seek any relief adversely to any charity.”<sup>1</sup>

The following section provides, “ That it shall be lawful for her Majesty’s Attorney-General, acting *ex officio*, to make such applications, and take and prosecute such proceedings with respect to any charity in the Court of Chancery or otherwise, as to him may seem fit, as if this Act had not been passed ; and that nothing in this Act contained shall be construed as dispensing with the fiat or allowance of her Majesty’s Attorney-General, with respect to any proceeding not being an application under the jurisdiction created by this Act, where such fiat or allowance was necessary before the passing of this Act.”

With respect to suits concerning charities, they are, as we have seen, instituted by the Attorney-General, either at the relation of individuals or *ex officio* ; and by the 43d section of the above-mentioned Act, every application to any Judge or Court under the jurisdiction thereby created may be made by the Attorney-General or by one or more of the trustees administering or persons interested in the charity, or any two or more of the inhabitants of any parish or place within which the charity is administered or applicable.

In proceedings by petition under Sir J. Romilly’s Act, it was necessary that the Attorney or Solicitor-General should signify his allowance or approbation of the petition, by affixing his signature

<sup>1</sup> See *Re Lister’s Hospital*, 6 De G., Mac. & Gor. 184.

to it. According to Lord Eldon,<sup>1</sup> a petition can derive no sanction from the signature of the Solicitor-General, he being competent to act only when there is no such officer as an Attorney-General. By the 43d section just referred to, the Attorney-General *ex officio* may make application by petition to the Court of Chancery under Sir J. Romilly's Act, or any future Acts authorizing similar applications.

The *original* petition must be signed by the petitioner in the presence of the solicitor, and be attested thus: — "Signed by the petitioners in the presence of A. B. solicitor to the petitioners in the matter of this petition." A certificate should also be obtained and left with the Attorney-General, signed by the counsel who prepared the petition, to the effect that, in his opinion, the petition is one proper to be presented under the Act.

The solicitor for the petitioners must also certify "that the above-named petitioners are able to answer the costs of this application." There must also be a certificate from the solicitor or his clerk, that the petition presented to the Judge is a true copy of the original petition submitted for the sanction of her Majesty's Attorney-General.<sup>2</sup>

After the sanction of the Board has been obtained, the proceedings are regulated by the 28th section of the 16 & 17 Vict. c. 137, whereby it is enacted, that, "Where the appointment or removal of any trustee, or any other relief, order or direction relating to any charity, of which the gross annual income for the time being exceeds thirty pounds,<sup>3</sup> shall be considered desirable, and such appointment, removal or other relief, order or direction might now be made or given by the Court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction, or by the Lord Chancellor intrusted with the care and commitment of the custody of lunatics, it shall be lawful for any person authorized in this behalf by the order or certificate of the said Board, or for the Attorney-General, to make application (without any information, bill or petition) to the Master of the Rolls or one of the

<sup>1</sup> *Ex parte Skinner in re Lawford Charity*, 2 Mer. 456; and see 1 Bligh, N. S. 65.

<sup>2</sup> *Re the Warwick Charities*, 1 Phil. 559.

<sup>3</sup> By the 30th section these provisions are extended to charities established, administered, or applicable for objects or purposes within the city of London, whose gross income is *under* 30*l.* per annum.

Vice-Chancellors sitting at chambers, for such order, direction or relief as the nature of the case may require; and the Master of the Rolls or the Vice-Chancellor to whom any such application shall be made shall and may proceed upon and dispose of such application in chambers, save where he may think fit otherwise to direct, and shall and may have and exercise thereupon all such jurisdiction, power and authority, and make such orders and give such directions in relation to the matter of such application as might now be exercised, made or given by the Court of Chancery, or by the Lord Chancellor intrusted as aforesaid, in a suit regularly instituted or upon petition, as the case may require; and the Master of the Rolls and Vice-Chancellors respectively shall, in relation to such applications as aforesaid, and the proceedings thereon, (subject to any rules which may be made by the Lord Chancellor, with the advice and consent of them or any two of them,) have all such power of directing matters to be heard in open Court, and of ordering what matters shall be heard and investigated by themselves and their chief clerks respectively, and such other powers and authorities as by the Act of the 15 & 16 Vict. c. 80, are vested in or authorized to be exercised by them at chambers; and the provisions of the said Act applicable to orders made by the Master of the Rolls or any of the Vice-Chancellors at chambers, shall extend to all orders so made under this Act." There are two provisos — 1st, to the effect, that there shall be no appeal where the gross annual income of the charity does not exceed 100*l*. 2d. That the Master of the Rolls or any Vice-Chancellor may direct an information or bill to be filed under the original practice.

By the 31st section the Lord Chancellor is empowered to make rules as to proceedings in chambers under the Act, and as to the restrictions under which an appeal is to be prosecuted. It is presumed that the proceedings will be the same as those set forth in the former chapter on Proceedings in Chambers.<sup>1</sup>

In the case of charities, whose incomes do not exceed 30*l*., jurisdiction is given to the District Courts of Bankruptcy and County Courts, subject to the power of the Board to direct the case to be originally submitted or subsequently transferred to the Court of Chancery, in which event it is to be dealt with as a charity whose income exceeds 30*l*.

<sup>1</sup> Ante, p. 1328.

By the 30th section a power of appeal is given to all persons, except the Attorney-General, upon notice to the particular Court and to the Board within one month after the date of the order, and upon a bond for the costs being entered into; but the Attorney-General may appeal at any time within three months without giving any notice or entering into any bond.

The 40th section enacts, that the appeal is to be by petition to the Court of Chancery, within three months from the date of the order allowing the appeal, otherwise the order appealed against is to be final.

A further Act<sup>1</sup> on the same subject, intituled "An Act to amend the Charitable Trusts Act, 1853," has received the sanction of the Legislature. This latter Act is to be construed as an Act with the Charitable Trusts Act, 1853, and contains several provisions strengthening the powers of the Commissioners, but not materially affecting the powers of the Court of Chancery. It would be inconsistent with the scope of this work to state further the details of these Acts; for further information on the subject, Mr. Finlaison's valuable work on the subject may be referred to.

The 3 & 4 Vict. c. 77, intituled "An Act for Improving the Condition and extending the Benefits of Grammar-Schools," has in the case of endowed grammar-schools enabled the Court of Chancery to exert a more extensive jurisdiction with respect to the system of education, the right of admission, the appointment of schoolmasters and other matters. It expressly provides, by the 21st section, "That all applications may be heard and determined and all powers given by this Act to the Court of Chancery may be exercised in cases brought before such Court, by petition only, such petition to be presented, heard and determined according to the provisions of the 52 Geo. III. c. 101."<sup>2</sup>

Under the 8 & 9 Vict. c. 70, intituled "An Act for the Amendment of the Church Building Acts," power is given to the Court of Chancery, upon petition presented in the manner just stated, to apportion charitable bequests between new parishes created by the Act and the remaining part of the old ones;<sup>3</sup> and by the 10th

<sup>1</sup> 18 & 19 Vict. c. 124.

<sup>2</sup> Attorney-General *v.* Lord Carrington, 4 De G. & Sm. 140; *Re* Louth Free School, 14 Beav. 201.

<sup>3</sup> There appears to be some difference of opinion as to the power of the Court under this Act. *Re* West Ham Charities, 2 De G. & Sm. 218; Attorney-General

section of the Charitable Trusts Amendment Act, the Charitable Commissioners have similar powers in all cases when the income of the charity does not exceed 30*l.* annually.

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### SECTION III.

#### *Statutes relating to Solicitors.*

ANOTHER important branch of the statutory jurisdiction of the Court arises under the recent statute of the 6 & 7 Vict. c. 73, intituled "An Act for consolidating and amending several of the Laws relating to Attorneys and Solicitors practising in England and Wales." Before considering the practice under this Act, it is desirable to state the jurisdiction, which, independent of any Act of Parliament, the Court has always exercised over solicitors.

Formerly, the sworn clerks were the only recognized agents of parties prosecuting causes in Chancery, but as the business of the Court increased, their number became insufficient to enable them to conduct throughout the suits of all the claimants. Consequently, the practice arose of confining the duty of the sworn clerks to the performance of a certain portion of the business in every suit, and the remainder was performed by solicitors duly admitted as officers of the Court. Upon the abolition of the office of Six Clerks, and sworn clerks, the duties performed by them were divided between the Clerks of Records and Writs and the solicitors of the Court. The former body were intrusted with the custody of the Records of the Court, and generally with that part of the duties of the Six Clerks and sworn Clerks in which they acted as confidential officers of the Court, whilst the solicitors, in addition to their former duties, have now to perform such portions of the business of the sworn Clerks as had reference more exclusively to the suitor, and was transacted by them as his agents. The solicitors have always been considered and treated as authorized officers of the Court, and the manner of their admission is regulated by the statute above referred to. As a consequence of their position as officers of the Court, the Court has always exer-  
*v. Dalton*, 13 Beav. 153; *Ex parte the Incumbent of Brompton*, 5 De G. & Sm. 626.

cised a summary jurisdiction over them. Thus, if a solicitor be guilty of gross professional misconduct, and the facts be established by affidavit, then the Court will, upon petition, order his name to be struck off the rolls.<sup>1</sup> More frequently, however, the summary jurisdiction of the Court has been put in force in cases where a party has applied for aid in gaining possession of deeds and documents retained by his solicitor. In the case of *Ex parte* the Earl of Uxbridge, a petition for this purpose was presented under the general jurisdiction of the Court over solicitors, and Lord Eldon said, "There was no doubt the Court exercised this jurisdiction long before the statute, which did little more than introduce the regulations under which the jurisdiction should be exercised."<sup>2</sup>

As in cases of this description the Court would not order the solicitor to deliver up the deeds of his client without providing for the payment of what was due for professional charges to the solicitor, the Court extended its summary jurisdiction by making orders upon petition for the delivery and taxation of the solicitor's bill, and by putting the client making the application upon terms which insured payment.<sup>3</sup>

Upon a similar principle, if a solicitor retained money received by him in his character of solicitor for the use of his client, his bill was taxable,<sup>4</sup> though it contained no charges for business of such a kind as would have rendered it taxable under the provisions of any statute previous to the 6 & 7 Vict. c. 73. Where the application for taxation of a solicitor's bill was not made until after payment, the Court used to exercise a discretionary power in determining whether such taxation should be ordered. The cases upon this subject are fully reviewed by Lord Cottenham in *Horlock v. Smith*,<sup>5</sup> and in *Waters v. Taylor*;<sup>6</sup> and from the judgment in those cases we deduce that it required a strong case to be made when a client applied for taxation of his solicitor's bill after pay-

<sup>1</sup> *Atkyns*, 173; *In re Martin*, 6 Beav. 337. If a deceit is practised by a solicitor, in his character as such, although not in a suit pending in the Court, he will be removed from his office as solicitor. *Matter of Peterson*, 3 Paige, 510.

<sup>2</sup> 6 Ves. 426; see also *In re Barker*, 6 Sim. 476; *In re Rice*, 2 Keen, 181; *In re Murray*, 1 Russ. 519.

<sup>3</sup> *In re Chilcote*, 1 Beav. 421.

<sup>4</sup> *In re Barker*, 6 Sim. 476, and see *Wilson v. Gutteridge*, 3 B. & C. 157; and *Dagley v. Kentish*, 2 B. & Adol. 411.

<sup>5</sup> 2 M. & C. 510.

<sup>6</sup> *Ibid.* 526.

ment and due opportunity for investigating the items ; but that the Court would give relief after any length of time if a case of fraud or improper conduct were proved against the solicitor. It seems also, that when there was an application to open a solicitor's bill upon the ground of improper charges, the respondent was as much entitled to have the particular items stated in the petition as a defendant to a bill filed for the purpose of opening a settled account is entitled to have the particular items on which the plaintiff intends to rely stated in the bill.

It is impossible to state clearly the circumstances under which the Court will make orders for the delivery up by a solicitor of the deeds of his client without first investigating the nature and extent of the lien which he possesses in respect of his bills for professional charges. This lien extends as well to deeds or documents of the client which may chance to be in the solicitor's hands in the course of business, as to any fund recovered in a suit conducted by him. There is, however, a material distinction between the lien upon a fund realized in a cause, and the lien which a solicitor has upon papers deposited in his hands by a client. The lien upon such a fund extends only to the costs of the particular suit under which the fund arises ; but to this limited extent the solicitor is entitled actively to enforce it ; whereas the right of a solicitor to retain possession of the deeds and papers of a client extends to all professional costs,<sup>1</sup> but cannot be actively enforced.<sup>2</sup> The lien of a solicitor exists only between the solicitor on the one side, and the client, or persons claiming under him, on the other ; it is not allowed to prejudice the rights or equities of the persons claiming adversely and paramount to the client.<sup>3</sup>

As a general rule, where the solicitor has once acquired a lien upon the papers of his client, no third party claiming under the client can interfere with the right of detention ; possession may be kept of the papers until they are redeemed by the full payment of the sum in respect of which the lien exists. Thus, in *Warburton v. Edge*,<sup>4</sup> a solicitor had been employed by an administratrix in the management of the intestate's estate, and also in a suit insti-

<sup>1</sup> *Ex parte Sterling*, 16 Ves. 258 ; *Ex parte Pemberton*, 18 Ves. 282 ; *Worrall v. Johnson*, 2 J. & W. 218.

<sup>2</sup> *Bozon v. Bolland*, 4 My. & Cr. 358.

<sup>3</sup> *Baker v. Henderson*, 4 Sim. 27 ; *Bell v. Taylor*, 8 Sim. 216 ; *Pelly v. Wathen*, 1 De G., Mac. & Gor. 20 ; *Francis v. Francis*, 2 De G., Mac. & Gor. 75.

<sup>4</sup> 9 Sim. 508.

tuted against her by a creditor of the deceased ; the creditor obtained a decree and presented a petition for reference to ascertain whether the solicitor had a lien upon certain papers, and for an order that he might deliver them up to the receiver, the petition was dismissed on the ground that there was other business done by the solicitor for the administratrix in the administration, and for the protection of the estate ; therefore, he must have a lien upon the deeds prior to the right of the administratrix to take them out of his hands, and consequently prior to the right of the plaintiffs, who were merely general creditors on the deceased's estate, and who therefore could only take the estate as they found it.

Although, however, the lien of a solicitor will, in general, prevail against persons claiming under the client, yet it seems that where a client has transferred either wholly or partially his interest in the estate to which the papers relate, the solicitor will only be able to claim a lien as against the person to whom the estate is so transferred to the extent of the sum which was due to the solicitor at the time of the transfer. Thus Lord Chancellor Sugden has decided, that a solicitor could only claim as against a judgment creditor of his client a lien upon the deeds of his estate for the amount of costs incurred prior to the *rendition of the judgment*.<sup>1</sup>

For the purpose of creating the lien, all that is necessary is, that the papers should come into the hands of the solicitor in the course of his professional business ; if the intention is to deposit papers for a particular purpose, and not to be subject to the general lien, that must be by special agreement.<sup>2</sup>

It is necessary, however, that they should have come into his hands in his professional character ; for, if they came to him in any other capacity, as, for instance, in that of steward of a manor, he will have no lien upon them.<sup>3</sup>

It has been before stated, that the lien upon papers is not one which can be actively enforced ; it consists simply in a right to retain papers until absolute payment of the solicitor's costs.

In *Postlethwaite v. Blythe*,<sup>4</sup> Lord Eldon however states it to be

<sup>1</sup> *Blunden v. Desart*, 2 Dr. & W. 405.

<sup>2</sup> *Ex parte Sterling*, 16 Ves. 258.

<sup>3</sup> *Champernown v. Scott*, 6 Mad. 93.

<sup>4</sup> 2 Swanst. 256.

“Contrary to the whole course of proceeding in this Court to compel a creditor to part with his security till he has received his money. Nothing but consent can authorize me to take the estate from the plaintiff before payment.” The expression above quoted was used with reference to a mortgage ; but, according to Lord Cottenham, the rule applies equally to the case of the lien of a solicitor, so that, as a matter of strict right, a solicitor may retain possession of documents in his possession until absolute payment to himself ; and the Court will not, without his consent, make an order for the delivery of them up, even upon ample security for the payment of his demand being brought into Court.<sup>1</sup> It appears, however, that if the withholding of the document would occasion the loss of the property itself, the Court will make a special order to prevent the lien having that effect.<sup>2</sup>

This right however of the solicitor to refuse production of documents deposited with him until his bill is paid, will not be allowed to prevail when the relation of solicitor and client has been terminated by any act of the solicitor himself, though it is otherwise where the solicitor is discharged by his client or his representatives.<sup>3</sup> In a case where the solicitor discharges himself, whether he does it directly, or does some act amounting indirectly to a discharge, a different rule prevails, materially qualifying the right of retention ; thus, in the case of *Colegrave v. Manley*,<sup>4</sup> where the plaintiff’s solicitor, by assigning over the business to another, discharged himself, he was ordered, though his bills of costs were not paid, to deliver up the papers to the new solicitor of the party, the latter undertaking to hold them subject to the former solicitor’s lien for what should be found due to him on the taxation of the bills. It is true, that, in several preceding cases where the solicitor had discharged himself, orders were made giving to the client the right of inspection only ;<sup>5</sup> but Lord Cottenham, in *Heslop v. Metcalfe*,<sup>6</sup> has followed the decision of Lord Eldon in *Colegrave v. Manley*, considering it to have been made by him after a full con-

<sup>1</sup> *Richards v. Playtel*, 1 C. & P. 79. Formerly it seems that although a solicitor could retain possession of deeds, yet he could be compelled to produce them for inspection. *Ross v. Laughton*, 1 V. & B. 349.

<sup>2</sup> *Richards v. Playtel*, *ubi supra* ; and see *Clifford v. Turrill*, 2 De G. & S. M. 1.

<sup>3</sup> *Lord v. Wormleighton, Jacob*, 580.

<sup>4</sup> *Turn. & Russ.* 400.

<sup>5</sup> *Moir v. Mudie*, 1 Sim. & St. 282 ; *Commerell v. Poynton*, 1 Swanst. 1.

<sup>6</sup> 3 M. & C. 187.

sideration of the preceding cases ; consequently, the practice<sup>1</sup> may be considered to be settled in accordance with that case.

Where a party has employed, as his solicitors in a cause, a firm of two solicitors in partnership, the retirement from the business of one of them operates as a discharge, and Sir James Wigram, in *Griffiths v. Griffiths*,<sup>2</sup> held that the client is thereupon entitled to require that the papers necessary for the prosecution of the cause should be delivered up to his new solicitor upon the usual undertaking for saving the lien of the discharged solicitors.

It does not seem very clear what is the extent of the lien of the personal representative of a deceased solicitor in a case where the relation between the client and his solicitor has not been terminated either by the solicitor discharging himself, or by the client discharging the solicitor, but where it has come to an end by the death of the solicitor. In the case of *Redfern v. Sowerby*,<sup>3</sup> Lord Eldon refused to order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor without payment or security for payment of the solicitor's bill.

It appears from the case of *Bray v. Hine*,<sup>4</sup> that the town agents of a country solicitor have a lien upon all the papers deposited in their hands, and that they are entitled to retain the papers in any particular cause or matter, until payment to them of the sum due from the owner of the papers to the country solicitor. When such payment has been made, the town agents may then set the sum which they have received off against the general debt due to them from the country solicitor.

The lien of a solicitor upon the fund recovered in a cause, does not extend beyond the costs of that particular suit.<sup>5</sup> And even though the fund in Court be recovered by means of a deed, upon which he has a general lien, yet his claim upon the money the fruits of the deed is not allowed to extend to general professional charges.<sup>6</sup> Where the fund recovered in the cause consists of trust

<sup>1</sup> *Cane v. Martin*, 2 Beav. 584 ; in which case, in addition to the usual undertaking, the new solicitor was ordered to undertake to prosecute the suit with due diligence.

<sup>2</sup> 2 Hare, 587. It seems doubtful how far the lien is affected by *taking a partner* ; *Pelly v. Wathen*, 1 De G., Mac. & Gor. 27 ; *In re Forshaw*, 16 Sim. 121.

<sup>3</sup> 1 Swanst. 84.

<sup>4</sup> 6 Price, 203.

<sup>5</sup> *Lann v. Church*, 4 Mad. 391.

<sup>6</sup> *Bozon v. Bolland*, 4 M. & C. 354, overruling *Worrall v. Johnson*, 2 Jac. & W. 214.

property, and the solicitor is retained only by the trustees, it does not appear that he has any lien upon the fund, as against the *cestui que trusts*.<sup>1</sup> So, also, if retained by some of the *cestui que trusts*, he has no lien against the share of any parties, other than those by whom he has been retained.<sup>2</sup> It frequently happens that a decree directs mutual payments between the parties to the cause. In such a case, the lien of the solicitor does not extend to all sums coming to the credit of his client, but only to the ultimate balance to be paid to him in the suit.<sup>3</sup>

The lien, however, upon a fund, differs from that upon papers, in that it may be actively enforced. Thus, if a sum of money be declared by decree or judgment to be due from one party to another, the solicitor for the party to receive may give notice of his lien to the party to pay the money;<sup>4</sup> and if the notice be disregarded, such party is liable to pay the money a second time to the solicitor.<sup>5</sup> So, also, when the fund coming to his client is in Court, the solicitor may present a petition for the taxation of his bill, and for payment of it out of the fund.

A solicitor cannot file a bill in equity for an account, in respect of his bill of costs.<sup>6</sup> It seems, however, that in some cases a solicitor may obtain a stop order upon a fund in Court before taxation of his bill or conclusion of the suit.<sup>7</sup>

<sup>1</sup> Worrall v. Harford, 8 Ves. 4.

<sup>2</sup> Hall v. Laver, 1 Hare, 577.

<sup>3</sup> Bawtree v. Watson, 2 Keen, 713. The solicitor's lien is only on the clear balance due to his client after all the equities arising out of that particular litigation are settled. But a party against whom a decree for costs has been made will not be permitted to set off against such costs a decree or judgment in his favor in relation to a distinct matter, to the prejudice of the solicitor's lien. Dunkin v. Vandenberg, 1 Paige, 622. The lien of an attorney, for his costs of the suit, is paramount to the claim of the adverse party, to set off a judgment recovered against the client in another suit. Gridley v. Garrison, 4 Paige, 647.

<sup>4</sup> Cowell v. Simpson, 16 Ves. 281; see also Howell v. Harding, 6 East, 362; Nicholson v. Norton, 7 Beav. 67.

<sup>5</sup> Watson v. Depeyster, 1 Caines, 67, note (a); Pinder v. Morris, 3 Caines, 165; Martin v. Hawkes, 15 John. 407; People v. N. York Common Pleas, 13 Wendell, 340; Ten Broeck, 10 Wendell, 617. Where the parties to a suit make a collusive settlement thereof, before a decree, for the purpose of defrauding the solicitor of his costs, his remedy is to proceed with the suit, in the name of his client, notwithstanding the collusive settlement. Talcott v. Bronson, 4 Paige, 501.

<sup>6</sup> Allison v. Herring, 9 Sim. 588.

<sup>7</sup> Hobson v. Shearwood, 8 Beav. 486.

If any security has been taken by a solicitor from his client, in any way inconsistent with the nature of the contract created by the lien, the lien seems to be altogether destroyed. Thus a special agreement to give credit for three years, on condition of receiving interest, had the effect of forfeiting the lien.<sup>1</sup>

We shall now proceed to consider the Act of 6 & 7 Vict. c. 73, by the 37th section of which statute it is enacted, "That from and after the passing of this Act no attorney or solicitor, nor any executor, administrator or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees or charges or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor shall have delivered<sup>2</sup> unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house or last known place of abode, a bill of such fees, charges and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or in the case of a partnership, by any of the partners, either with his own name, or with the name or style of such partnership), or of the executor, administrator or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill." Although by this section it is rendered imperative upon a solicitor, before he takes any step to compel payment of his costs, that he should have delivered a copy of his bill duly signed, or a copy enclosed in a letter duly signed, referring to the copy so sent; yet the client is not bound by this rule, and he may take proceedings for the taxation of a bill which has not been duly delivered to him according to the statute. Lord Cottenham<sup>3</sup> says, "There is an obvious reason for requiring that a bill should be signed as a protection to the client against the solicitor, in order that there may be no doubt as to the nature and extent of the demand, but I cannot

<sup>1</sup> *Cowell v. Simpson*, 16 Ves. 282.

<sup>2</sup> After a solicitor has delivered his bill he will not as a general rule be allowed to add or subtract any items from it for any purpose arising under this Act. *In re Jones*, 8 Beav. 479; *In re Carver*, 8 Beav. 436; *In re Wells*, 8 Beav. 416; *Re Andrews*, 17 Beav. 515. It is different in the case of a taxation between party and party, *Davis v. Earl of Dysart*, 21 Beav. 125.

<sup>3</sup> *In re Pender*, 2 Ph. 75.

conceive what benefit could arise from requiring that it should be signed for the purpose of taxation at the instance of the client; on the contrary, such a construction of the Act might lead to great malpractices. For the solicitor is by the Act subjected to this penalty, that if he delivers a bill too large by one sixth of its amount, he pays the costs of the taxation, and it is obvious that it would open the door to very improper practices, if the solicitor, having informed the client of the amount and particulars of his demand by the delivery of an unsigned bill, should, when the client applies to have it taxed, be allowed to protect himself from that penalty by saying that the bill was not signed. There is, therefore, a very sufficient reason why the Court should require a bill to be signed before the solicitor can take any proceedings upon it, but no reason why a bill should go for nothing, when the client comes for taxation, merely because it is not signed."

It appears that a delivery to an agent of the client authorized to receive it is a sufficient delivery under the statute.<sup>1</sup>

Upon the application<sup>2</sup> of the party chargeable<sup>3</sup> by such bill within such month, it shall be lawful, in case the business contained in such bill or any part thereof shall have been transacted in the High Court of Chancery, or in any other Court of Equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any Court of Law or Equity,<sup>4</sup> for the Lord High Chancellor, or the Master of the Rolls, and in case any part of such business shall have been transacted in any other Court for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any Judge, or either of them, and they

<sup>1</sup> *In re Bush*, 8 Beav. 66.

<sup>2</sup> When the amount of a solicitor's bill has been allowed to a solicitor in a settled account, or if there has been any special agreement as to the manner in which the costs shall be settled and paid, the Court apparently can make an order for the taxation of the bill under the statute; but the decisions on the subject are obscure. See *In re Stephen*, 2 Phil. 562, and the remarks of the Master of the Rolls in *Re Fisher*, 18 Beav. 183; *Re Ransom*, id. 220.

<sup>3</sup> An insolvent is not a party chargeable within the meaning of this provision. *In re Halsall*, 11 Beav. 163. But a married woman who has made her separate estate liable, although she must petition by her next friend, is a party chargeable within the meaning of this section. *Waugh v. Waddell*, 16 Beav. 521. See also *Re Stephen*, 2 Phil. 563; *Re Pugh*, 17 Beav. 510.

<sup>4</sup> As to the meaning of these words, see *Re Gaitskell*, 1 Phil. 580; *Re Stephen*, 2 Phil. 563; *Re Andrews*, 17 Beav. 510.

are hereby respectively required, to refer such bill and the demand of such attorney or solicitor, executor, administrator or assignee thereupon to be taxed and settled by the proper officer of the Court in which such reference shall be made, without any money being brought into Court, and the Court or Judge making such reference shall restrain such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference.<sup>1</sup>

<sup>1</sup> The following forms of order made under this section exhibit the practice. The common order for delivering up of deeds and for taxation is as follows:—

“ In the matter of A. B., one of the solicitors of this Court. Upon the humble petition of C. D. of, &c., this day preferred unto the Right Honorable the Master of the Rolls, it was alleged that the petitioner employed the above-named A. B. as his solicitor in various matters of business for him between the month of                      and the month of                      185 . That the petitioner is desirous of obtaining the papers in the possession of the said                      belonging to the petitioner, but the said A. B. refuses to deliver up the same until his bill of costs is paid; that the said A. B., although applied to, has not delivered his bill of costs against the petitioner; that the petitioner submits to pay what shall appear to be due in respect of the said bill. It was therefore prayed, and it is accordingly ordered, that the said A. B. do within a fortnight after notice hereof deliver to the petitioner a bill of all such fees and disbursements as he claims to be due to him from the petitioner; and that it be referred to the Taxing Master of this Court in rotation to tax and settle the said bill, and that the petitioner and also the said A. B. produce before the said Master upon oath, as he shall direct, all books, papers, and writings in their custody or power respectively relating to the matters hereby referred, or any of them, and that they be examined upon interrogatories touching the same matters or any of them as the said Master shall direct. And it is ordered, that the said                      do give credit for all sums of money by him received of, or on account of the petitioner, and that he be at liberty to charge all sums of money paid by him to or on account of the petitioner. And it is ordered, that if such bill when taxed be less by a sixth part than the said bill as delivered, the said Master do tax the petitioner his costs of such reference, and if such bill when taxed shall not be less by a sixth part than the said bill as delivered, the said Master do tax the said costs of such reference. And it is ordered, that the said Master do certify the amount due from the petitioner to the said A. B., or from the said A. B. to the petitioner, as the case may be, having regard to the costs of such reference to be taxed as aforesaid, and any sum or sums of money which may have been so received or paid as aforesaid. And it is ordered, that the amount so to be certified be paid accordingly, unless the Court shall, upon special circumstances to be certified by the said Master otherwise order, upon application to be made within one week after the date of the said Master's certificate by the party liable to pay such amount. And it is ordered, that upon payment by the petitioner to the said A. B. of what may be certified to be due to him as

“And in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon<sup>1</sup> the application of the attorney or solicitor, or the executor, administrator or assignee of the attorney or solicitor, whose bill may have been so as aforesaid delivered, sent or left, or upon the application of the party chargeable by such bill, with such directions, and subject to such conditions as the Court or Judge making such reference shall think proper,<sup>2</sup> and such Court or Judge may restrain such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any aforesaid, or in case it shall appear that there is nothing due to the said A. B., he the said A. B. do deliver to the petitioner upon oath all deeds, books, papers, and writings in his custody or power belonging to the petitioner. And it is ordered, that no proceedings at law or otherwise be commenced against the petitioner in respect of the said bill pending such reference.” And see *Cooper v. Ewart*, 2 Phil. 362.

It will be observed, that by the form of this order the petitioner submits to pay what shall appear to be due in respect of the bill. One effect of this is, that where a solicitor is employed by more than one person an order of course for the taxation of the bill can only be obtained upon the submission and undertaking of all the clients. *In re Perkins*, 8 Beav. 241; *Ex parte Mobbs*, 8 Beav. 499. The effect of the submission is, that the petitioner is precluded from denying his liability in respect of the bill before the Taxing Master. It appears that both at Law and in Equity the Master has the power of considering questions of retainer. *Re Clarke*, 1 De G., Mac. & Gor. 43.

It may be here observed, that an order in the form to deliver up *all* papers, &c., will be irregular, unless the order is for the taxation of all the bills due to the solicitor from the petitioner. The mere circumstance, however, that the solicitor has a special lien upon some of the deeds in his possession belonging to the petitioner will not make the order irregular, as the solicitor may apply to the Court to prevent his lien being violated, should the order for delivery be sought to be enforced against the deeds he is entitled to retain. *In re Pender*, 2 Phil. 78, and 8 Beav. 279; *In re Teague*, 11 Beav. 318; *Holland v. Gwynne*; *In re Byrch*, 8 Beav. 124.

<sup>1</sup> Notice is not requisite on an application to tax in cases falling within this part of the section. *Re Gaitskell*, 1 Phil. 580; *Re Pender*, 2 Phil. 69.

<sup>2</sup> Although from these words it might be inferred that, in every case where a month had expired after the delivery of the bill, the Court would not make an order without considering the circumstances of the case, and making conditions accordingly, yet such is not the practice. Unless some of the circumstances mentioned in the next proviso have occurred, an order of course may be obtained before payment of a bill, and after the expiration of a month from the delivery. See *Holland v. Gwynne*; *In re Byrch*, 8 Beav. 124; see also *In re Bromley*, 7 Beav. 487; *Ex parte Shackell*, 2 De G., Mac. & Gor. 842.

action<sup>1</sup> or suit touching such demand pending any reference, upon such terms as shall be thought proper.”

<sup>1</sup> See note on p. 1867 for the terms upon which taxation a month after delivery is granted. The form of the order made upon such occasion is as follows : —

“ In the matter of A. B., one of the solicitors of this Court. Upon the humble petition of C. D. of        this day preferred unto the Right Honorable the Master of the Rolls, it was alleged that the petitioner employed the above-named A. B. as his solicitor in certain conveyancing business and other matters. That the said A. B. on or about the        day of        last delivered unto the petitioner his bill of fees and disbursements, which, as the petitioner is advised, contains many unreasonable and extravagant charges, and the same does not contain any item for business done in either of the Courts of Law or Equity. That the petitioner submits to pay what shall appear to be due to the said A. B. on the taxation of his said bill; it was therefore prayed and it is accordingly ordered, that it be referred to the Taxing Master of this Court, in rotation, to tax and settle the said bill, and that the petitioner and also the said A. B. do produce before the said Master, upon oath, as he shall direct, all books, papers, and writings in their custody or power, respectively relating to the matters hereby referred, or any of them; and that they be examined upon interrogatories touching the same matters, or any of them, as the said Master shall direct. And it is ordered that the said A. B. do give credit for the sums of money by him received of or on account of the petitioner, and that he be at liberty to charge all sums of money paid by him to or on account of the petitioner. And it is ordered, that if such bill when taxed be less by a sixth part than the said bill so delivered, the said Master do tax the petitioner his costs of such reference; and if such bill when taxed shall not be less by a sixth part than the said bill so delivered, the said Master do tax the said A. B. his costs of such reference. And it is ordered, that the said Master do certify the amount due from the petitioner to the said A. B., or from him to the petitioner, as the case may be, having regard to the costs of such reference so to be taxed as aforesaid and any sum or sums of money which may have been so received or paid as aforesaid. And it is ordered, that the amount so to be certified be paid accordingly, unless the Court shall, upon special circumstances, to be certified by the said Master, otherwise order upon application to be made within one week after the date of the said Master’s certificate by the party liable to pay such amount. And it is ordered, that upon payment by the petitioner to the said A. B., of what may be certified to be due to him as aforesaid, or in case it shall appear that there is nothing due to him, he the said A. B. do deliver to the petitioner upon oath, all deeds, books, papers, and writings in his custody or power belonging to the petitioner. And it is ordered, that no proceedings at law, or otherwise, be commenced against the petitioner in respect of the said bill pending such reference. *But the petitioner is to procure the said Master’s report in a month, (unless the said Master shall certify that further time is necessary to enable him to make his report,) or this order is to be of no effect. These words in italics are added where the petitioner does not apply for the order to tax until after the expiration of a month from the delivery of the bill.”*

It will be observed here, that an order for taxation can be obtained by the solicitor himself, as well as by the client. In a case<sup>1</sup> before Lord Langdale, M. R., the solicitor had been employed, both by a testator during his lifetime, and by his executors after his decease, so that there were two sets of bills; one incurred on the retainer of the testator, and chargeable against the estate, and to be paid in a due administration of assets; the other set incurred on the retainer of the executors in relation to the testator's estate, and for which they were liable. Under these circumstances the executors sought for the delivery and taxation of the set of bills incurred upon their own retainer; the solicitor objected, and claimed that both sets might be taxed, whereupon Lord Langdale held that, the petitioners coming for a taxation of their part of all the bills, the respondent had a right to ask for a taxation of his bills against the testator.

The 37th section of the Act then proceeds as follows: — “Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after the verdict shall have been obtained, or a writ of inquiry executed, in any action<sup>2</sup> for the recovery of the demand of such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent or left as aforesaid, except under special circumstances,<sup>3</sup> to be proved to the satisfaction of the Court or Judge to whom the application for such reference shall be made.

<sup>1</sup> *In re Dalby*, 8 Beav. 469.

<sup>2</sup> Where taxation is ordered after action brought, the general rule is, that if anything is found due the client must pay the costs of the action. *In re Hair*, 11 Beav. 96. Apparently, after judgment, no application at all can be made under this Act; and if an application to tax has been made to a Court of Law and refused, the client cannot resort to a Court of Equity. *Re Barnard*, 2 De G., Mac. & Gor. 364; *Ex parte Shackell*, id. 842.

<sup>3</sup> It will be seen by the proviso, that no order of course can be obtained for the taxation of a bill twelve months after delivery, or after verdict; but in such cases the ground upon which such taxation is asked must be set forth in a special petition. There have not been many cases in which the Court has had to decide what are special circumstances within the meaning of this proviso, though there have been very numerous decisions as to the meaning of the corresponding words in sect. 41, post, p. 1872. The following cases, however, may be referred to on the subject: *Re Bagshawe*, 2 De G. & Sm. 205; *Re Gedye*, 14 Beav. 56; *Re Barnard*, 2 De G., Mac. & Gor. 364; *Re Williams*, 15 Beav. 417.

“ And upon every such reference, if either the attorney or solicitor, or executor, administrator or assignee of the attorney or solicitor, whose bill shall have been delivered, sent or left, or the party chargeable with such bill, having due notice, shall refuse to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand *ex parte*; and in case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs<sup>1</sup> of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent or left, then such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, shall pay such costs, and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent or left, then the party chargeable with such bill making such application, or so attending, shall pay such costs; and every order to be made for such reference as aforesaid shall direct the officer to whom such reference shall be made, to tax such costs of such reference, to be so paid as aforesaid, and to certify what, upon such reference, shall be found to be due to or from such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor in respect of such bill and demand, and of the costs of such reference if payable.

“ Provided also, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the Court or Judge shall be at liberty to make thereupon any such Order as such Court or Judge may think right respecting the payment of the costs of such taxation.

“ Provided also, that where such reference as aforesaid shall be made when the same is not authorized to be made, except under special circumstances, as hereinbefore provided, then the said Court or Judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference.

“ Provided also, that it shall be lawful for the said respective Courts and Judges in the same cases in which they are respectively

<sup>1</sup> *Re Adamson*, 18 Beav. 460; *In re Clarke*, 1 De G., Mac. & Gor. 43.

authorized to refer a bill, which has been so, as aforesaid, delivered, sent or left, to make such order for the delivery by any attorney or solicitor, or the executor, administrator or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery of deeds, documents or papers in his possession, custody or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor by such Courts or Judges respectively, where any such business had been transacted in the Court in which such order was made: provided also, that it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, in proving a compliance with this Act to prove the contents of the bill he may have delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements subscribed in the manner aforesaid, or enclosed in, or accompanied by such letter as aforesaid, was delivered, sent or left, in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent or left, was not such a bill as constituted a *bonâ fide* compliance with this Act.

“ Provided also, that it shall be lawful for any Judge of the Superior Courts of Law or Equity to authorize any attorney or solicitor to commence an action or suit, for the recovery of his fees, charges or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said Judge that there is probable cause for believing that such party is about to quit England.”

By the 38th section a provision is made for the taxation of bills on the application of third parties; the section is as follows: —  
“ Where any person not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained shall be liable to pay, or shall have paid, such bill either to the attorney or solicitor, his executor, administrator or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was

made by the party so chargeable with such bill as aforesaid.<sup>1</sup> Provided always, that in case such application is made when under the provisions herein contained a reference is not authorized to be made except under special circumstances, it shall be lawful to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid, if he was the party making the application."

By the 39th section,<sup>2</sup> "It is made lawful in any case in which a trustee, executor, or administrator has become chargeable with any such bill as aforesaid for the Lord High Chancellor, or the Master of the Rolls, if in his discretion he shall think fit, upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid, or be entitled to pay such bill, to refer the same, and such attorney's or solicitor's, or executor's, administrator's or assignee's demand thereupon, to be taxed and settled by the proper officer of the High Court of Chancery, with such directions and subject to such conditions as such Judge shall think fit, and to make such order as such Judge shall think fit for the payment of what may be found due, and of the costs of such reference to or by such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, by or to the party making such application, having regard to the provisions herein contained relative to the applications for the like purpose by the party chargeable with such bill, so far as the same shall be applicable to such cases, and in exercising such discretion as aforesaid, the said Judge may take into consideration the extent and nature of the interest of the party making the application: provided always, that where any money shall be so directed to be paid by such attorney or solicitor, it shall be lawful for such Judge, if he shall think fit, to order the same or any part thereof to be paid to such trustee, executor, or administrator so chargeable with such bill, instead of being paid to the party making such application, and when the party making such appli-

<sup>1</sup> The effect of this is, that a person "liable to pay" within the meaning of this section, may obtain an order of course for the taxation of a solicitor's bill. *In re Bracey*, 8 Beav. 338. And see *In re Moss*, 17 Beav. 345; *Re Taylor*, 18 Beav. 165; *Re Becke and Flower*, 5 Beav. 410.

<sup>2</sup> Under this section a special application to tax is necessary; *Re Straford*, 16 Beav. 27.

cation shall pay any money to such attorney or solicitor, or executor, or administrator, or assignee of such attorney or solicitor, in respect of such bill, he shall have the same right to be paid by such trustee, executor or administrator so chargeable with<sup>1</sup> such bill, as such attorney, or solicitor, or executor, administrator, or assignee of such attorney or solicitor had."

By the 40th section it is enacted, "That for the purpose of any such reference upon the application of the person not being the party chargeable within the meaning of the provisions of this Act as aforesaid, or of a party interested as aforesaid, it shall be lawful for such Court or Judge to order any such attorney or solicitor to deliver to the party making such application a copy of such bill upon payment of the costs of such copy:<sup>2</sup> provided always, that no bill which shall have been previously taxed and settled shall be again referred, unless under special circumstances the Court or Judge to whom such application is made shall think fit to direct a re-taxation thereof."

By the 41st section it is enacted, "That the<sup>3</sup> payment of any such bill as aforesaid shall in no case preclude the Court or Judge to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such Court or Judge, appear to require the same, upon such terms and conditions, and subject to such directions as to such Court or Judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

This provision is quite absolute. It seems that under no circumstances can an order for taxation of a bill be obtained twelve months after it has been paid without circumstances of fraud.<sup>4</sup> The rule, moreover, applies where the bill has been paid by a

<sup>1</sup> *Re Downes*, 5 Beav. 425; *Re Becke and Flower*, 5 Beav. 410.

<sup>2</sup> *Re Blackmore*, 13 Beav. 154.

<sup>3</sup> It seems clear that although the payment of a bill will not preclude an order under this Act for taxation, unless twelve months have expired, yet after payment no order of course for taxation is regular. And it may be here observed, that if an order of course be irregularly obtained, the Court, upon the irregularity being brought forward, will discharge the order, even though the parties who obtained it may be able to show circumstances entitling them to a special order for taxation, *Ex parte Carew*, 8 Beav. 150; *Holland v. Gwynne*, *In re Byrch*, 8 Beav. 124.

<sup>4</sup> *Ex parte Pemberton*, 2 De G., Mac. & Gor. 960.

trustee, and the application is made by a party interested, or "liable to pay," within the meaning of the Act, but it must appear how long before payment the bill was delivered.<sup>1</sup> With respect to the special circumstances which will induce the Court to order taxation after payment, Lord Langdale, M. R., says, "The special circumstances are, as I conceive, such as exist or take place at the time of payment, or such as appear on the face of the bills themselves. Payment may be so extorted as to induce the Court to say, that the bill containing improper charges, even to a small amount, shall not be protected from taxation, and the bill may contain charges so gross, that the insertion of them in the bill is of itself evidence of fraud and oppression, from which the client will be relieved."<sup>2</sup> Payment under protest amounts to nothing, and if there has been no pressure and items of overcharge or otherwise be relied on, they must be so grossly improper as to amount to evidence of fraud, and must be specially pointed out and strictly proved; according to some of the cases it would seem that there must be both pressure and items of overcharge amounting to fraud to induce taxation after payment. The subject is fully discussed in the judgment of Vice-Chancellor Wood in *Blagrove v. Routh*.<sup>3</sup>

By the 18 & 19 Vict. c. 124, s. 40, the Charitable Commissioners may order the bill of costs of any attorney or solicitor, for business done by him on behalf of any charity or the trustees thereof to be taxed by the Taxing Masters of the Court of Chancery, and if satisfied that it contains exorbitant charges, may order it to be taxed, notwithstanding it may have been paid by the trustees of the charity at any period not more than six calendar months before such order, and the amount taxed off is to be a debt due from the solicitor to the trustees, and to be paid by him accordingly.

By the 42d section, a power is given to the officer to whom the reference is made, to request the proper officer of any Court to assist him in taxing the bill.

<sup>1</sup> *In re Massey*, 8 Beav. 458; *Re Mash*, 15 Beav. 83.

<sup>2</sup> *In re Currie*, 9 Beav. 602; see also following cases: *In re Browne*, 1 De G., Mac. & Gor. 322; *In re Barrow*, 17 Beav. 547; *In re Bayley*, 18 Beav. 415; *In re Abbott*, 18 Beav. 393; and as to what will constitute payment so as to preclude an order of course for taxation, *Re Taylor*, 15 Beav. 145; *Re Boyle*, 5 De G., Mac. & Gor. 540; *Re Currie*, *ubi supra*; *Re Blackmore*, *ubi supra*.

<sup>3</sup> 2 Kay & J. 509.

By the 43d section, "All applications made under this Act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivery up of deeds, documents and papers, shall be made in the matter of such attorney or solicitor, and that upon the taxation and settlement of any such bill the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree or rule of Court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced<sup>1</sup> according to the course of the Court in which such reference shall be made.

With respect to the principles upon which the taxation of a bill is conducted, it is obvious that it would be impossible to enter into any statement as to what items will be allowed, and what disallowed by the Taxing Masters. A certain number of cases have occurred in which the Court has had to decide whether the Taxing Masters have been right in allowing or disallowing charges, and these cases are referred to in the notes.<sup>2</sup> It will have been observed, that if a bill is reduced by more than one sixth, the solicitor has to pay the costs of the taxation, according to the statute. If on the other hand it is reduced to less than one sixth, the taxation is paid for by the client. It becomes, therefore, a question frequently of some nicety to determine what items due from the client to the solicitor may be inserted into the professional bill. The Master of the Rolls, considering the point an important one, obtained a certificate from the Taxing Masters, which is as follows:<sup>3</sup>

"That we have been unable to reconcile all the reported cases with the actual practice of the profession, in charging some payments as professional disbursements in bills of costs, and others as payments in cash accounts. The practice is almost universal to make a distinction between such payments. And if we may be

<sup>1</sup> For the enforcement of orders for the payment of money, see former part of this work, p. 1054; and as to orders under this section, *Re Mourilyan*, 13 Beav. 84; *Re Brainbrigge*, id. 104; *Re Dufaur and Blakeney*, 16 Beav. 113; *Re Wisewold*, Id. 357; *Re Minter*, 19 Beav. 35.

<sup>2</sup> *In re Pender*, 10 Beav. 390; *Smith v. Earl of Effingham*, in which case see the certificate of the Taxing Masters; see also *Friend v. Solly*, 10 Beav. 329; *Sturge v. Dimsdale*, 9 Beav. 176.

<sup>3</sup> *In re Remmant*, 11 Beav. 611; and see *In re Bedson*, 9 Beav. 5; *Re Clarke*, 1 De G., Mac. & Gor. 43.

allowed to state what, in our opinion, is the principle on which the practice of the profession rests, apart from and without reference to the reported cases, we should state it as follows, viz. : —

“ That such payments as the solicitor in the due discharge of the duty he has undertaken is bound to make, so long as he continues to act as solicitor, whether his client furnishes him with money for the purpose, or with money on account, or not ; as, for instance, fees of the officers of the Court, fees of counsel, expense of witnesses, &c., and also such payments in general business, not in suits, as the solicitor is looked upon as the person bound, by custom, to make, as for instance, counsels’ fees on abstracts and conveyances, payments for registers in proving pedigrees, stamp duty on conveyances and mortgages, charges of agents, stationers or printers employed by him, &c., are, by practice, and we think properly, introduced into the solicitor’s bill of fees and disbursements.

“ But that payments which the solicitor is not either by law bound to make, or by custom looked upon as the person to make, as for instance, purchase-moneys or interest thereon, moneys paid into Court, damages or costs paid to opponent parties, bills due to the solicitors of trustees, mortgagees or other parties, legacy or residuary duties,<sup>1</sup> or other payments of a like description, which the solicitor makes as agent, on the order of the client, and not in discharge of his own duty or liability as solicitor, are, by practice, and we think properly, charged in the cash account.

“ We think also, that the question, whether such payments are professional disbursements or otherwise, is not affected by the state of the cash account between the solicitor and the client, and that, for instance, counsels’ fees would not the less properly be introduced into the bill of costs, as a professional disbursement, because the client may have given money expressly for paying them, and that purchase-money or damages would be properly so introduced, notwithstanding the solicitor may have advanced the money out of his own funds.

“ We have availed ourselves of your Lordship’s permission to state our opinion without reference to the decided cases, some of which we are aware are not quite in accordance with it ; but we are satisfied, that although instances may no doubt be produced to

<sup>1</sup> *Re Haigh*, 12 Beav. 307.

the contrary, the general practice of the profession is in accordance with the principle we have above stated."

It also appears that it is the practice not to strike anything out of the bill, but to tax off all items disallowed, and to include the amount of all such disallowed items in the computation for the purpose of awarding the costs of the reference, subject to a special report if necessary.<sup>1</sup>

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## CHAPTER XLIV.

### WHERE DIFFERENT APPLICATIONS ARE MADE.

SINCE the foregoing part of this work was printed, a series of General Orders, bearing date the 12th day of November, 1856, have issued, defining certain applications which may now be made in Chambers, and which consequently ought not any longer to be made in Court. Moreover, it has been found that considerable doubt and difficulty often exist in determining what applications should be made by special motion on notice to the Court, what applications should be made in Chambers, and what orders can be obtained by motion or petition of course. It is the object of this Chapter to give as much information on these points as can be obtained, but no perfectly precise rules can be laid down, as there exists some latitude of discretion in the Judges both in Court and in Chambers. It was decided by the Judges in Chambers, very soon after the Chancery Amendment Act came into operation, that no application should be entertained in Chambers for orders which could be had by motion or petition of course; consequently the first thing for the practitioner to determine with respect to any order he may require is, whether it can be obtained by motion of course or by petition of course. A list has accordingly been made of the Orders that may be obtained upon petition at the Rolls, for which the Editor is desirous of expressing his thanks to the Secretary of the Master of the Rolls; which list is as follows:—

<sup>1</sup> See the certificate in *Re Clarke*, 13 Beav. 180.

LIST OF ORDERS THAT CAN BE OBTAINED UPON PETITIONS  
OF COURSE AT THE ROLLS.

## AMENDMENT OF RECORDS, ETC.

To amend enrolment of bargain and sale.<sup>1</sup>

To amend enrolment of deed, acknowledged under Fines and Recoveries Act.

To amend title to depositions by altering name of plaintiff (by consent).<sup>2</sup>

## ANSWER.

On application of plaintiff for defendant to answer without oath.<sup>3</sup>

The like without oath or signature.

The like for a peer to answer without protestation of honor.

The like for an infant to answer by guardian *ad litem* without the oath or signature of guardian.

On application by defendant for leave to answer without oath or signature (by consent).

By married woman to answer separate from her husband.<sup>4</sup>

For liberty to put in answer in French language, and to appoint notary to interpret oath and answer when sworn, and to translate and file answer and translation together.

To engross on parchment documents written on paper and annexed to answer (taken abroad), and file them with answer.

For time to answer cross bill.<sup>5</sup>

For liberty to file supplemental answer (by consent).

For answer to be taken as that of the petitioner's only, though purporting to be that of petitioner's and another (by consent).

To add counsel's name (by consent), without answer being taken off the file.

To take answer off the file and amend the jurat (by consent).

<sup>1</sup> The petitions must be supported by an affidavit of the circumstances under which the error in the deed enrolled occurred, and be presented before the time has expired for enrolling the deed under the particular Act of Parliament.

<sup>2</sup> All consents should be indorsed by the solicitor at the foot of the petition before presented.

<sup>3</sup> Ante, p. 646.

<sup>4</sup> If living apart, or husband out of the jurisdiction, or property settled to wife's separate use; ante, p. 766.

<sup>5</sup> Original bill having been amended after cross-bill filed.

To file answer to amended bill without plaintiff withdrawing replication to original bill, and that replication shall stand as a replication to both answers (by consent).

To file answer notwithstanding omission in caption (by consent).

To take answer off the file, to insert the day on which it was sworn, and to refile it without its being resworn (by consent).

For schedules to answer to be delivered out to notary for translation instead of his attending at the office (by consent).

To amend title of answer, and have it filed without being resworn (by consent).

For liberty to file an answer, although plea and answer already filed (by consent).

To appoint and swear interpreter to translate jurat or caption out of foreign into English language, and that translation be filed with answer.

To put in answer in foreign language, and to appoint an interpreter to translate answer; such translation to be annexed and filed.

To take traversing note off the file (by consent) in order that defendant may put in an answer.

For liberty for Clerk of Record and Writs to add name of counsel who drew answer, and thereupon to file it.

For liberty for defendant to take answer off the file, and file a fresh answer (by consent).

For liberty to file exceptions to answer after time (by consent.)

#### APPEARANCE.

For defendant to be at liberty to enter conditional appearance.<sup>1</sup>

To alter common into special appearance (by consent).

To enter appearance for defendant after decree (by consent).

For liberty to withdraw appearance, and for appearance to be struck out of book on application of defendant (by consent).

#### ARBITRATION.

For delivery of books, &c., deposited with Clerk of Records and Writs to arbitrator (by consent).

To enlarge time for arbitrator to make his award (by consent.)

<sup>1</sup> Ante, p. 558.

## ATTACHMENT, &amp;c.

For sheriff to return attachment for non-payment of money into Court.

The like for want of answer.

• For Chancellor of the County Palatine of Lancaster to return attachment.<sup>1</sup>

For sheriff of county palatine to return mandamus to the Chancellor.

For sheriff to return writ of *fi. fa.*<sup>2</sup>

## TO ATTEND PROCEEDINGS.

Leave to attend persons served with notice of decree under 15 & 16 Vict. c. 86, s. 42, R. 8.

## BILL OR CLAIM.

To amend claim *before affidavits* filed. Petitioner undertaking to reserve a copy of the claim as amended.

To amend bill before appearance without costs.<sup>3</sup>

After appearance and before answer without costs.

After answer, and requiring a further answer, upon payment of 20s. costs.

After answer, not requiring further answer without costs.

By striking out defendant before appearance without costs.

By striking out defendant after appearance upon payment of taxed costs.

After insufficient answer, and that defendant may answer amendments and exceptions at same time.

By naming fresh next friend before appearance.

The like after appearance in room of one deceased.

To amend bill after plea or demurrer but before set down.

After demurrer by some defendants set down.

To amend in respect of clerical errors.

To amend by striking out a plaintiff and making him a defendant (by consent).

To amend requiring further answer from some defendants and not from others.

To amend bill by consent of defendants after time expired.

<sup>1</sup> Ante, p. 463.

<sup>2</sup> Ante, p. 1050.

<sup>3</sup> Ante, p. 415.

To amend by altering plaintiff's name (by consent).

To withdraw replication and amend bill (by consent).

To amend bill of interpleader by annexing usual affidavit thereto.

To amend without withdrawing replication (by consent).

To amend without prejudice to proceedings already had (by consent).

To amend claim before affidavits filed, undertaking to re-serve a copy of the amended claim.

#### TO DISMISS BILL.

Before appearance.

The like after appearance with costs.

To dismiss bill without costs (by consent).

To dismiss bill (by consent) on special terms agreed on.

To dismiss bill with costs to be paid by the defendant (by consent).

To dismiss bill on payment of a sum certain (by consent).

The like with costs to be taxed.

To dismiss bill without costs, and for delivery back of documents deposited with Clerk of Records and Writs (by consent).

#### CAUSES, HEARING, &c., ONLY IN ROLLS' CAUSES.

To set down cause to have bill taken *pro confesso* where sole defendant.

To set down cause for further directions and costs.

The like to come on with exceptions already set down.

To set down cause to be reheard as to such part as is remitted by the Lord Chancellor.

To set down cause remitted by the House of Lords, with special directions as to decree to be made.

#### CONTEMPT, PRISONER, &c.

For *habeas corpus* to bring defendant to bar of the Court to answer his contempt, in not answering the plaintiff's bill.

For *habeas corpus* directed to the keeper of the Queen's prison to bring petitioner into Court to be present at the hearing of a motion in the cause.

For *habeas corpus* to bring witness before the examiner to be examined in chief or cross-examined on his affidavit.

For *habeas corpus* directed to the sheriff to bring petitioner to the bar of this Court to answer his contempt in not paying money in order to his being turned over to the Queen's prison.

To discharge defendant (not in custody) as to contempt to attachment for not answering.

The like, defendant in custody of sheriff by virtue of attachment.

The like, in contempt to a messenger.

The like, having been brought up by *habeas* and remanded.

The like, in custody of messenger on solicitor undertaking to pay taxed costs of contempt.

To discharge defendant out of custody for his contempt in not transferring stock in Court (on certificate of Accountant-General).

To discharge contempt for not having deposited papers pursuant to order (on certificate of the officer of the Court, that same have been deposited).

To discharge contempt to Sergeant-at-Arms.

To discharge contempt for not having filed a sufficient affidavit of documents, &c. (on certificate of chief clerk).

Ditto for not leaving an account verified by affidavit of personal estate (pursuant to order), on certificate of chief clerk.

To discharge from contempt for want of answer, defendant having put in a plea to the whole bill.

To discharge defendant out of custody for contempt in not answering, plaintiff having amended his bill.

To discharge defendant out of custody as to his contempt in not answering, except as to costs, he being an insolvent debtor.

To discharge defendant as to contempt for not appearing.

To discharge defendant out of custody on attachment for non-payment of money into Court, on deposit of the amount, and his solicitor having undertaken to pay costs (by consent), Accountant-General's office shut for the holidays.

To discharge plaintiff out of custody on attachment for nonpayment of costs (by consent).

To discharge defendant out of custody (by consent).

For *habeas corpus* to bring defendant into Court to answer his contempt in not answering, and that Clerk of Records and Writs may be ordered to attend at the hearing with plaintiff's bill, in order to same being taken *pro confesso*.

To discharge defendant out of custody of Sergeant-at-Arms, on certificate by Master of deposit of deeds, upon payment or tender of cost of contempt to be taxed.

### COSTS.

For taxation and payment of costs of bill of discovery.

For taxation and payment of costs of bill for perpetuating testimony.

The like of costs of demurrer and suit, demurrer not having been set down.<sup>1</sup>

The like of costs of plea and suit, plea not having been set down.<sup>2</sup>

For plaintiff to give security for costs on statement of residence, out of the jurisdiction, as appearing by the bill.<sup>3</sup>

For reference to tax costs ordered to be paid by award.

To tax costs under Lands Clauses Consolidation Act, on application of purchaser.

The like, on application of vendor.

### DECREE, ORDER, &c.

To enter decree or order *nunc pro tunc*.

### DEEDS AND DOCUMENTS.

For return of deeds, &c. deposited by defendant, after bill dismissed.

For Clerk of Enrolments to return deed left by mistake.

To remove deeds from Master's office to plaintiff's office, for greater convenience of examination (by consent).

For delivery of deeds out of Master's office to plaintiff's solicitor, for delivery to the purchasers (by consent.)

For delivery of deeds to purchasers (by consent.)

For delivery of deeds to solicitor for the purpose of having the same proved in the country, the solicitor undertaking to return the same.

For delivery back of deeds deposited by defendant with Clerk of Records and Writs (by consent).

For delivery of deeds deposited with Clerk of Records and

<sup>1</sup> Ante, p. 618.

<sup>2</sup> Ante, pp. 30, 31.

<sup>3</sup> Ante, p. 715.

Writs to the Master to whom cause referred for purpose of prosecuting decree (by consent).

For delivery back of deeds deposited with Clerk of Records and Writs, on undertaking to re-deposit them when required (by consent).

For Clerk of Records and Writs to produce deeds, &c., deposited by defendant before Examiner on the examination of witnesses.

For delivery out to solicitor of deeds deposited in Master's office for production before arbitrators (by consent).

#### DEMURRER AND PLEA.

(In Rolls' Causes.)

To set down demurrer or plea on application of plaintiff or defendant.<sup>1</sup>

For liberty to withdraw demurrer on payment of costs (by consent).

#### DISCLAIMER.

For defendant to be at liberty to file disclaimer without oath.<sup>2</sup>

#### DISTRINGAS.

To discharge distringas on application of party who lodged it.<sup>3</sup>

The like on application of executor or administrator of party who lodged it, on production of probate.

#### ELECTION.

For plaintiff to elect whether he will proceed at law or in equity.<sup>4</sup>

#### EVIDENCE.

To read as evidence on inquiry before the Master depositions taken in another cause (by consent).<sup>5</sup>

To produce documents in this Court on trials, &c., in Courts of Law and otherwise.

For Clerk of Rolls' Chapel to attend Committee of Privileges with records.

<sup>1</sup> Ante, p. 620.

<sup>2</sup> Ante, p. 786.

<sup>3</sup> Ante, pp. 1793, 1794. •

<sup>4</sup> Ante, p. 817.

<sup>5</sup> Ante, p. 868.

To attend Lord Chancellor with records.

For Clerk of Enrolments to attend Committee of House of Lords with enrolment of specification.

For Clerk of Enrolments to produce specification of patent on trial at Nisi Prius.

For Clerk of Enrolments to produce memorial of annuity on trial at Nisi Prius.

For Clerk of the Petty Bag to produce letters patents, &c., on trial.

For Clerk of the Petty Bag to attend Committee of House of Lords with records.

For Clerk of the Petty Bag to attend with roll of solicitors on trial at Nisi Prius.

For Clerks of Records and Writs to attend grand jury, and on trial of indictment, with bill and answers.

For Clerk of Records and Writs and Examiner to attend assizes with original interrogatories and depositions.

For Master to deliver to solicitor a bill of costs left in his office for production on trial at law, on his undertaking to return it.

For delivery of affidavits to Clerk of Assize for production on trial at Assizes.

For delivery of affidavits to solicitor after departure of Clerk of Assize, for production on trial at Assizes.

For Clerk of Records and Writs to attend Examiner with affidavit on examination of a witness.

For Clerk of Records and Writs to attend grand jury with affidavits on an indictment for perjury, and at trial.

For Clerk of Records and Writs to attend House of Lords with record of bill and answer on an appeal.

#### EXCEPTIONS.

To set down exceptions to Master's general report.

The like and to come on with exceptions set down.

For leave to withdraw exceptions (by consent).

To adjourn exceptions and that they may come on with cause for further directions (by consent).

For liberty for a creditor or other person not a party to file exceptions to Master's report.

## GUARDIAN.

For commission to take answer of a defendant out of the jurisdiction of the Court (by consent).

To appoint guardian *ad litem* for infant defendant in room of one deceased.

To appoint a guardian *ad litem* before decree.<sup>1</sup>

To appoint guardian for person of unsound mind not found so by inquisition.

## HEARING.

For liberty to examine witness *vivâ voce* or to read affidavits at the hearing, to prove documents.<sup>2</sup>

To read depositions in original cause on hearing of supplemental cause or cross cause.

To read depositions in another cause between the same parties.

To read bill and other proceedings in a former cause between the same parties.

To read affidavits taken in one cause on hearing of another cause.

## INFANT.

To appoint new next friend to prosecute suit in the place of one deceased.<sup>3</sup>

To appoint guardian *ad litem* in room of one deceased.

## INFORMATION.

To appoint new relator in place of one deceased.<sup>4</sup>

## INJUNCTION.

To dissolve injunction (by consent).

## ENROLMENTS.

For Clerk of Enrolments to return deeds, &c., left by mistake, without enrolling the same.

<sup>1</sup> Petition supported by the affidavit of the solicitor who appears for the infant, or the joint affidavit of a solicitor and a member of the family, that the petitioner is an infant, and that proposed guardian is a fit and proper person, and has no interest adverse to the infant, ante, p. 765.

<sup>2</sup> Ante, pp. 876, 877.

<sup>3</sup> Ante, pp. 68, 69.

<sup>4</sup> Application to be made by the new relator with the Attorney-General's consent. *Attorney-General v. Harvey* (V. C. Stuart), *Weekly Reports*, 1854 & 1855, p. 136.

## LIS PENDENS.

For liberty for Registrar of Judgments in Common Pleas to enter satisfaction in respect of entry of *lis pendens*, on application of party who registered same.

The like, in respect of entry of orders for payment of money, on application of party who registered same.

The like order, on application of party against whose estate same registered (by consent).

## PAUPER.

For plaintiff to prosecute in *formâ pauperis*.

For defendant to defend in *formâ pauperis*.

For liberty to sue out writ of error in *formâ pauperis*.

To assign a fresh counsel for a pauper.

To discharge order to defend in *formâ pauperis*, on application of the pauper.

## RECOGNIZANCE.

To enrol recognizance *nunc pro tunc*.

To vacate recognizance (by consent).

To vacate Receiver's recognizance after liberty given to apply.<sup>1</sup>

## ORDERS OF REVIVOR AND SUPPLEMENT UNDER 52D SECT.

15 & 16 VICT. C. 86.

To revive on marriage of plaintiff.<sup>2</sup>

The like on death of plaintiff.

The like on death of defendant.

Supplemental order on birth of infant.

## SOLICITORS.

On application of plaintiff or defendant to change solicitor.

The like to change solicitor and agent.

The like to appoint a solicitor in London, in lieu of one in the country who has acted by his agent.

The like to appoint country solicitor and agent, in lieu of solicitor in town.

The like to prosecute or defend in person, instead of by a solicitor.

<sup>1</sup> Ante, p. 1447.

<sup>2</sup> Ante, p. 1591.

The like to appoint a solicitor to prosecute or defend, in lieu of prosecuting or defending in person.

On application of one out of several plaintiffs to change solicitor, for the purpose of an application separate from co-plaintiffs.

By solicitor for plaintiff or defendant to change his agent.

To tax bill of fees under Solicitors Act.

*Under 37th Section.<sup>1</sup>*

To tax bill for business in Chancery delivered within a month.

To tax a bill for conveyancing or other matters not in either of the Courts of Law or Equity.

The like after the expiration of a month from delivery of the bill.

The like after action brought on submission to pay.

The like by executors.

The like of bill delivered by executor of deceased solicitor.

The like by assignees of a bankrupt.

The like by executors, after action brought, where retainer as to part of the bill admitted and as to residue disputed.

To tax agency bill.

To tax bill delivered by consent.

To tax bill delivered, and for delivery and taxation of further bill.

On application of solicitor to have his own bill taxed.

The like for proof in a bankruptcy by consent of assignees.

For delivery and taxation of a bill in a suit.

The like for conveyancing or other business not in either of the Courts of Law or Equity.

For delivery only where it is uncertain, whether any proceedings have been taken in either of the Courts.

*Under 38th Section.<sup>2</sup>*

N. B. The forms of the ordering part of all orders under this section of the act are the same ; but the circumstances entitling the party to the order vary in almost every case.

The following are merely given as illustrations of the various cases occurring under this section of the act : —

On application by lessee to tax bill of lessor's solicitor for costs of lease.

<sup>1</sup> Ante, p. 1862.

<sup>2</sup> Ante, p. 1865.

The like of costs of agreement for a lease.

The like by mortgagor to tax bill delivered by mortgagee's solicitor.

The like by second mortgagee and purchaser of equity of redemption to tax costs of first mortgagee's solicitor.

The like by purchaser to tax bill of vendor's solicitor for costs incurred under conditions of sale.

The like by a trustee under a deed of arrangement.

The like by trustee for sale of bill of costs of mortgagee's solicitor.

The like by purchaser of costs of surrender by lessee of an invalid lease and grant of a fresh one.

On application of solicitor for payment of amount found due by Master after order to tax with submission to pay.

To discharge order to tax on application of party who obtained it, before notice of motion given to discharge.

To strike solicitor off the roll at his own request.

To strike solicitor off the roll pursuant to an order of the Court.

To re-admit solicitor struck off the roll at his own request.

#### WITNESSES.

To examine witnesses *de bene esse* (witness dangerously ill) by plaintiff before answer.

The like (witness more than 70 years of age) by plaintiff before answer.

The like by defendant after answer.<sup>1</sup>

The foregoing list contains most of the orders of course that are now granted upon petitions of course at the Rolls. It may be stated generally that these orders may also be obtained on motions of course. It does not appear, however, that orders on motions of course are quite limited to the foregoing list; but there are cases when orders will be granted on motions without notice which could not be obtained upon petition at the Rolls. It would not, however, be possible to give a complete list of these occasions, and the foregoing information enumerates the ordinary occasions when orders of course can be obtained upon motion or petition.

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<sup>1</sup> If defendant is desirous of examining a witness before answer, the application must be to the Court on motion. *Brown v. Child*, 3 Sim. 457.

With respect to applications under Acts of Parliament, the practice appears to have grown up as follows. First, it was held, that there was no jurisdiction to make an order in Chambers when the Act stated that it might be made on motion or petition. To remedy this defect the 18 & 19 Vict. c. 134 was enacted, which gave to the Judge in Chambers jurisdiction over these statutory applications,<sup>1</sup> subject however to General Orders issuing from the Court of Chancery to define the manner and extent to which this jurisdiction should be exerted. General Orders to this effect have recently issued, bearing date the 12th day of November, 1856, and it will be convenient now to set forth these Orders, as defining applications which may now undoubtedly be made in Chambers. They are as follows : —

The business to be disposed of by the Master of the Rolls and the Vice-Chancellors respectively while sitting at Chambers shall comprise the following matters ; (that is to say,)

- “ 1. Applications for payment to any person or persons of the dividends or interest of any stocks or funds standing on the credit of any cause or matter depending in the Court of Chancery to the separate account of such person or persons.”

It might be presumed from this Order that all applications for the payment out of Court of capital sums standing on the credit of any cause must be made to the Court and not in Chambers. This, however, on inquiry, does not seem to be the interpretation put upon the Orders by the Judges. On the contrary, it appears that applications are sometimes admitted for the payment out of capital when the amount is not more than 300*l*. It may, however, be presumed, that no application can be made in Chambers for the payment of dividends or interest of any stocks or funds standing on the credit of any cause which have not been carried over to the separate account of the parties applying.

- “ 2. Applications under the 32d section of the Act of Parliament passed in the 36th year of the reign of King Geo. III. c. 52, in all cases where the sum paid into the Bank of England, or the stock transferred into the name of the Accountant-General under such section, does not exceed three hundred pounds cash, or three hundred pounds stock, as the case may be.”

<sup>1</sup> Ante, p. 1334.

This is the section enabling executors and personal representatives to pay into the Bank of England the legacies of infants or absentees.

“ 3. Applications under the Act passed in the Session of Parliament holden in the 10th and 11th years of the reign of her present Majesty, c. 96, intituled ‘An Act for better securing Trust Funds, and for the Relief of Trustees,’ and the Act passed in the Session of Parliament holden in the 12th and 13th years of the reign of her present Majesty, intituled, ‘An Act for the further Relief of Trustees,’ in all cases where the trust fund does not exceed three hundred pounds cash, or three hundred pounds stock, as the case may be.”

In a former part of this work will be found the other Orders relative to the Acts mentioned in this Order. It was there stated that the 18 & 19 Vict. c. 134, had given the Chancellor power to direct that proceedings under it might be commenced in Chambers. This Order must be taken as the mode in which that power may be exercised.

“ 4. Applications under ‘The Trustee Act, 1850,’ and the Act of Parliament passed in the Session of Parliament holden in the 15th and 16th years of the reign of her present Majesty, intituled ‘An Act to extend the provisions of “The Trustee Act, 1850,”’ in all cases where any Decree or Order shall have been made by the Court for the sale or conveyance of any lands.”

The jurisdiction under these Acts hereafter to be exercised in Chambers will not be very extensive. At the time when the Trustee Act received the sanction of the legislature the Masters’ offices were still in existence, and no powers had been conferred upon the Judge in Chambers. It may now be considered settled, that no Order which the Court of Chancery is authorized by these Acts to make upon motion or petition will be made in Chambers, with the exception of the case provided for in this Order when an Order has been made for the sale or conveyance of lands.

“ 5. Applications on behalf of infants under the 12th, 16th and 17th sections of the Act of Parliament passed in the first year of the reign of King Will. IV. c. 65, in all cases where the infant is a ward of the Court of Chancery, or the administration of the estate of the infant, or the

maintenance of the infant, is under the direction of the Court.”

These sections relate to the surrender and renewal of leases of infants' estates.

“In the 4th of these Orders, the word ‘lands’ is to be construed according to the definition and interpretation thereof contained in the 2d section of ‘The Trustee Act, 1850.’”

Probably these Orders, combined with what was before<sup>1</sup> stated, would nearly settle all questions as to the applications to be made in Chambers; but as the subject is one of daily occurrence and of considerable practical importance, it has been deemed advisable, even at the risk of repetition, to give more minute information on the subject.

In the first place, as it has already been stated, no application should be made in Chambers for an order that can be obtained on motion or petition of course.

Secondly, no application should be made in Chambers for an order under the statutory jurisdiction of the Court of Chancery, which, by the terms of the Act, is to be made upon motion or petition, unless the order applied for comes within any one of the series of General Orders of the 12th of November, 1856.

If the application comes within the terms of these General Orders, it may be obtained. Consequently, there seems to be no difficulty concerning the statutory jurisdiction.

With respect, however, to the ordinary jurisdiction, no such clear or certain rules can be laid down. In point of fact, there is much latitude of discretion confided to the Judges, and therefore it is not possible to frame a list and assert with precision that certain applications will be received in Chambers, and that all others must be made to the Court. A list, however, is appended, which it is believed will be found of use in enabling the practitioner to form an opinion, subject to the foregoing remarks, whether any particular application can be made in Chambers. It may also be observed, that it is competent to the Judges to refer any question they may think fit, under their ordinary jurisdiction, to Chambers, and consequently, where the decree directs the reference of a particular matter, there can be no doubt that it will be there entertained; but no inference can be thence derived that a similar

<sup>1</sup> Ante, p. 1333.

matter, concerning which no specific direction is contained in a decree, will be entertained in Chambers.

THE FOLLOWING IS A LIST OF APPLICATIONS THAT HAVE BEEN MADE AT CHAMBERS.

1. For the guardianship of infants (except the appointment of guardians *ad litem*).

For leave for a guardian to present to a rectory on the nomination of the infant.

2. For the maintenance and advancement of infants.

As for instance — For leave for an infant to go abroad.

To apprentice an infant.

There seems to be no limit to the jurisdiction in Chambers under these heads, so that all other applications relating to the management of wards of Court may be made in Chambers.<sup>1</sup>

3. For the administration of estates under the Act of 15 & 16 Vict. c. 86, s. 45 & 47, and, as consequent thereon, such applications as —

To amend summonses and duplicates.

For an order on further consideration as to matters originating at Chambers.

4. Time to plead, answer or demur.

For leave to file voluntary answer.

5. Leave to amend bills or claims.<sup>2</sup>

For instance — Leave to withdraw replication under an order to amend.

For enlarging the time to amend under an order to amend.

To appoint a new next friend in place of a deceased next friend.

To make a plaintiff a defendant.

<sup>1</sup> With respect to the Act enabling the Court of Chancery to make binding settlements of the estates of infants, see ante, p. 1405. An order for the appointment of a special guardian to concur on a special case is included in the notice given in Nov. 1852, as to the application to be made in Chambers, but on reference to the Act and to the construction that has been put on the statutory jurisdiction, it seems that such an order cannot be made in Chambers, ante, p. 421.

<sup>2</sup> It must be recollected, that no order to amend, which can be obtained upon a motion or petition of course, should be applied for in Chambers.

6. For enlarging publication or the time for closing evidence.  
     For enlarging the time for filing affidavits in answer  
     and in reply on a motion for a decree.  
     For enlarging the period for cross-examination of a  
     witness.<sup>1</sup>
7. For the production of documents.  
     When admitted by answer.  
     By defendants under 15 & 16 Vict. c. 86, sect. 10.  
     By plaintiffs under 15 & 16 Vict. c. 86, sect. 20.
8. Relating to the conduct of suits or matters, as for instance —  
     Appointment of a special Examiner.  
     Time to file a replication.  
     Leave to file exceptions to answer after time expired.  
     For service of a copy of a bill on a defendant out of  
     the jurisdiction.<sup>2</sup>  
     For leave for plaintiff to enter appearance for a defend-  
     ant within the jurisdiction who has not appeared.  
     For leave for plaintiff to pay money into Court in lieu  
     of security for costs.
9. Relating to carrying out proceedings under decrees and or-  
     ders.<sup>3</sup>  
     Service of notice of decree on persons of unsound  
     mind, or infants.  
     Substituted service of notice of decree.  
     Substituted service of summons, notice of affidavits,  
     and warrants to hear.  
     For additional accounts and inquiries to those directed  
     by the decree or order.  
     To appoint a person to represent the estate of a de-  
     ceased party for the purpose of proceedings in  
     Chambers.  
     Order for a defendant to leave accounts by a decree  
     directed to be taken.

<sup>1</sup> It may be observed, that an order for leave to file interrogatories after the time limited by order of 16th August, 1852, cannot be made in Chambers (except by consent) but must be made in Court, see ante, p. 379.

<sup>2</sup> It may be doubted whether there is sufficient authority to serve an administration summons out of the jurisdiction.

<sup>3</sup> This head is not enumerated in the notice of November, 1852, ante, p. 1332, but it has been deemed convenient to include a variety of applications that may undoubtedly be made in Chambers.

Order for a party to file examination in answer to interrogatories and the decree.

Order for a witness to attend and be examined or stand committed.<sup>1</sup>

To give the conduct of a suit to a creditor or other party.

To allow a claimant as creditor after certificate of debts.

To continue account and fix a new day for payment after certificate made in a foreclosure suit.

In addition to these and many similar applications that might be enumerated relating to carrying out decrees and orders, it may be mentioned that, by the decree, whatever is directly referred to Chambers will, of course, be there considered, though the subject is not one usually so dealt with.

10. As to matters connected with the management of property.

To appoint a Receiver under an order directing a proper person to be appointed.

To appoint a new Receiver in place of a deceased or discharged Receiver.

To discharge a Receiver and vacate recognizances.<sup>2</sup>

To enable the executor of a deceased Receiver to pass his final account and pay the balance.

To appoint a new surety for a Receiver.

To compel a Receiver to bring in his account.

For leave to sue Receiver's sureties.

To enable a Receiver to grant leases, do repairs, and for all other directions to a Receiver.

For directions to trustees and executors as to recovering, getting in, or otherwise managing property.

For payment of money into Court by an auctioneer in lieu of security for deposits.

For sale by private contract of lands directed to be sold.

<sup>1</sup> Such an order appears to have been made, but the case provided for is somewhat special, and it cannot be assumed, as a matter of course, that such an order can be obtained in Chambers.

<sup>2</sup> It may be doubted whether this and the two preceding applications would be entertained in Chambers when there was a dispute on the subject.

Leave for parties to bid at the sale.

To open biddings.

To compel the delivery of an abstract of a title on a sale under the order of the Court.

To compromise or take security for a debt.

11. For payment into Court of purchase-moneys under sales by order of the Court, and investing the same.

Inquiry as to title.

For leave for purchaser to pay off encumbrances out of his purchase-money.

Compensation to purchaser for misdescription.

To substitute purchasers.

For delivering out of deeds to purchaser.

12. For payment into Court<sup>1</sup> of moneys admitted by an accounting party (if not opposed).

13. For stop order when assignor and assignee concur.

To discharge a stop order.

14. References under a private Act directed to be taken before a master in ordinary.

15. References under the Charitable Trust Act, 1853.

To appoint trustees.

To settle a scheme.

16. Orders not coming directly under the above heads.

To take an account under an elegit.

To discharge distringas.

To appoint an arbitrator under the Common Law Procedure Act.

The foregoing list cannot, from the nature of the case, be made complete. Moreover, with respect to some of the applications enumerated, it must be recollected that it is in general within the discretion of the Judge in each case, whether he will hear a matter in Chambers or in Court. Consequently it cannot be laid down as a certainty that all these applications will, on all occasions, be entertained in Chambers. But it is believed that this list and the foregoing observations will in general enable a practitioner to determine without difficulty whether he ought to apply at once in Chambers, whether he should make a special motion to the Court, or whether he can obtain the order he wishes for by a motion or petition of course.

<sup>1</sup> For payment out of Court, see ante, p. 1888.

# **A P P E N D I X .**



# PART I.

## BILLS AND INFORMATIONS.

### CHAPTER I.

#### FORMS OF TITLES, ADDRESSES, COMMENCEMENTS AND CONCLUSIONS OF ORIGINAL SUITS BY INFORMATION OR BILL.

##### I. *Title.*

###### 1.

[*English.*]

In Chancery.

Lord Chancellor.

Vice Chancellor

[*or* The Master of the Rolls].

Between A. B., Plaintiff,  
C. D., Defendant.

##### II. *Address.*<sup>1</sup>

###### 2.

[*English.*] To the Right Honorable Robert Monsey, Baron Cranworth, of Cranworth, in the County of Norfolk, Lord High Chancellor of Great Britain.

###### 3.

(*Where the Chancellor or person holding the seals is a party.*) To the Queen's Most Excellent Majesty, in her High Court of Chancery.

###### 4.

[*United States Circuit Courts.*] To the Judges of the Circuit Court of the United States for the District of ——.²

<sup>1</sup> The address should of course contain the appropriate and technical description of the Court, and must be varied accordingly. Story Eq. Pl. § 26. See ante, Vol. I, p. 361.

<sup>2</sup> 20th Equity rule of the United States Courts.

## 5.

*Massachusetts and Maine.*] To the Honorable the Justices of the Supreme Judicial Court, next to be holden [*or now sitting*] at —, within and for the County of —, and Commonwealth of Massachusetts [*or State of Maine*], &c.

Or, thus:—

To the Honorable the Justices of the Supreme Judicial Court, sitting in Equity.

## 6.

*New Hampshire.*] Rockingham ss. To the Supreme Judicial Court.

## 7.

*Vermont.*] To the Honorable A. B., Chancellor of the First [*or Second, or other*] Judicial Circuit.<sup>1</sup>

## 8.

*New Jersey.*] To the Honorable H. W. G., Esq., Chancellor of the State of New Jersey.

III. *Commencements.*

## 9.

*English, General Form.*] Humbly complaining sheweth [*or show*] unto his Lordship A. B., of &c., [*or A. B., of &c., and C. D., of &c.,*] the above-named plaintiff [*or plaintiffs.*]

## 10.

*Circuit Courts of the United States.*] “A. B., of —, and a citizen of the State of —, brings this, his bill, against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —, and thereupon your orator complains and says, that” &c.<sup>2</sup>

<sup>1</sup> This form is in compliance with the 1st Chancery Rule in Vermont, (11 Vt. Rep. 689) which provides that “All bills in Chancery shall be addressed to the Chancellor, within the judicial district where the same is to be heard.” But the usual form of address in practice is “To the Court of Chancery next to be held at —, within and for the County of —,” which is in strict compliance with the Statute of Vermont, (Genl. Sts. of 1863, p. 249, § 18.) The requirement of the statute is that “All bills and petitions in the Court of Chancery shall be addressed to the Court of Chancery in the County where such bills are required by law to be entered or shall be pending.” And since, by an Act passed in 1856, (Session Laws of Vermont of 1856, p. 12, No. 7, § 6,) all former laws providing for the division of the State into judicial districts were repealed, the form of address given in this note as the usual form is doubtless the correct one.

<sup>2</sup> See ante, Vol. I. pp. 319, 362, 363.

<sup>3</sup> 20th Equity Rule of the United States Courts.

## 11.

*New Hampshire.*] “A. B., of &c., complains against C. D., of &c., and E. F., of &c., and says,” &c.<sup>1</sup>

## 12.

*Massachusetts.*] Humbly complaining, sheweth unto your honors your orator [*or the plaintiff*] F. A. L., now of D., in the County of N., and Commonwealth of Massachusetts, executor of the last will and testament of J. H. L., late of B., in the County of S., and Commonwealth aforesaid, Physician, deceased, that the said J. H. L., in his lifetime &c.

Or, thus:—

S. R. of B., in said County of S., merchant, and executor and trustee under the last will and testament of E. S., late of said B., widow, brings this, his bill [*or bill of complaint*] against J. E. H., of C., in the State of O., E. S. L., of B., in the State of M., and the — Company, a corporation duly established under the laws of Massachusetts; and thereupon your orator [*or the plaintiff*] complains and says, that the said E. S., by her &c.

IV. *Commencement in Special Cases.*

## 13.

*Husband and Wife.*] Humbly complaining, show &c., A. B., of &c., and C. B., his wife.

## 14.

*Wife suing alone.*] Humbly complaining, &c., A. B., of &c., wife of B. B., of the same place, by E. F., of &c., her next friend.

## 15.

*Infants.*] Humbly complaining, &c., A. B. & C. B., of &c., infants under the age of twenty-one years, by E. F., their next friend.

## 16.

*Lunatics, &c.*] Humbly complaining, &c., A. B., of &c., a lunatic, [*or non compos mentis,*] by E. F., of &c., his guardian [*or next friend, when plaintiff is of unsound mind, but not so found by inquisition*] [*or committee of the (person and) estate of the said A. B.,*] that &c.

Or,

A. B., of &c., by C. D., of &c., committee of the [person and] estate of the said A. B., and the said C. D. &c.

<sup>1</sup> In New Hampshire, “every bill in the introductory part shall contain the names, places of abode, and proper description of all the parties, plaintiffs and defendants, by and against whom the bill is brought.” Chancery Rule, 2.

17.

*Assignee of Insolvent Debtor.*] Humbly complaining, &c., A. B., of &c., assignee of the estate and effects of C. D. &c., an insolvent debtor &c.

18.

*A person deaf and dumb.*] Humbly complaining, &c., A. B., of &c., being deaf and dumb, by C. D., of &c., trustee, his next friend &c.

19.

*Banking Corporation.*] Humbly complaining, &c., the President, Directors and Company of &c., a corporation duly established by law within the State [*or Commonwealth*] of &c.

20.

*Railroad Corporation.*] Humbly complaining, &c. The Boston and Worcester Railroad Corporation &c.

21.

*Municipal Corporation.*] Humbly complaining, &c. The Mayor, Aldermen and Commonalty [*or citizens*] of the City of &c., [*or The City of &c., or The Inhabitants of the Town or City of —,*] in the County of &c.

22.

*Foreign Corporation.*] Humbly complaining, &c. The Governor and Company of the Bank of Scotland [*or The Dutch West India Company*] &c.

23.

*Creditor, suing on behalf of himself and others.*] A. B., of &c., on behalf of himself and all other unsatisfied creditors of E. F., &c., who shall come in and contribute to the expenses of this suit &c.

24.

*Shareholders in a Company.*] A. B., of &c., on behalf of himself and all other the shareholders [*except the defendants hereto*] in a certain company called “——.”

25.

*In Suits on behalf of the Government.*] Informing sheweth &c. C. I. R., &c., Attorney-General of the State [*or Commonwealth*] of &c., on behalf of the said State [*or Commonwealth*] &c.

26.

*Where there is a Relator.*] Informing sheweth &c. C. I. R., &c., Attorney-General &c., at and by the relation of the Rector, Wardens

and Vestry of — Church in L., &c., for and in behalf of themselves and the rest of the Parishioners &c.

## 27.

*Where the Case is by Information and Bill.*] Informing &c., at and by the relation of A. B., of &c., and C. D., of &c. And also humbly complaining, show, &c., the said A. B. and C. D., &c.

V. *The Premises or Stating Part (after narrating the facts and circumstances of the plaintiff's case) concludes.*<sup>1</sup>

## 28.

And your orator [*or the plaintiff,*<sup>2</sup>] hoped that the said C. D. [the defendant] would have complied with the reasonable requests of your orator [*or the plaintiff*] as in justice and equity he ought to have done.

VI. *The Charge of Confederacy.*<sup>3</sup>

## 29.

BUT NOW SO IT IS, may it please your honors [*or your honor*] that the said R. H., combining and confederating with divers persons [*or if there are several defendants, then thus* — combining and confederating together and with divers persons] at present unknown to your orator [*or the plaintiff,*] whose names, when discovered, your orator [*or the plaintiff*] prays he may be at liberty to insert herein with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your

<sup>1</sup> In regard to the stating part of the bill, see ante, Vol. I. p. 364 *et seq.*

<sup>2</sup> By 7th Chancery Rule in New Hampshire it is provided that, "when the names of parties are omitted they shall be referred to as *plaintiffs* or *defendants*." Modern English bills employ the terms "plaintiff" and "defendant" throughout. See ante, Vol. I. p. 319 *et seq.*

<sup>3</sup> It was formerly customary in almost every bill to introduce a general charge of confederacy against the defendants. But there is no such statement in the model of a bill given in England by the general orders of 1852, and it is scarcely necessary to say that such a charge would now in that country be deemed idle and impertinent, except under very special circumstances. This charge is said to be wholly unnecessary and to be treated as mere surplusage in Story Eq. Pl. § 29. By the 21st Equity Rule of the United States Courts, it is provided that: — "The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the Common Confederacy Clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff." By the 4th of the Equity Rules of Massachusetts: — "The common charge of fraud and combination shall be omitted, except in cases where it is intended to charge fraud and combination specifically." So by the 1st of the Chancery Rules in Maine: — "The formal averments of combination and pretence shall be omitted." So by the 2d of the Chancery Rules in New Hampshire, the Common Confederacy Clause may be omitted.

orator [*or the plaintiff*] in the premises, he, the said R. H., absolutely refuses to comply with such requests, and he at times pretends that, &c.

*Another form.*

*But now so it is*, may it please your honors [*or your honor*] that the said R. H., L. M., and N. M., in concert with each other, allege that, &c., [*or colluding and confederating with each other, refuse to comply with such requests, and pretend that, &c.*]

VII. *The Charging Part.*<sup>1</sup>

30.

Whereas, your orator [*or the plaintiff*] charges the contrary to be the truth, and that, &c.

VIII. *The Jurisdiction Clause.*<sup>2</sup>

31.

All which actings, doings, and pretences of the said defendant [*or defendants*] are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator [*or the plaintiff*] in the premises. In tender consideration whereof, and forasmuch as your orator [*or the plaintiff*] is remediless in the premises, at and by the strict rules of the common law, and is relievable only in a Court of Equity, where matters of this nature are properly cognizable and relievable. To the *end*, therefore, &c.

IX. *Interrogating Part.*<sup>3</sup>

32.

To the *end*, therefore, that the said C. D., E. F., and G. H., and their

<sup>1</sup> By the 21st Equity Rule of the United States Courts it is provided that the plaintiff, in his bill, shall be at liberty to omit, at his option, what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill, and he may in his narrative or stating part of his bill state and avoid by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. By the 3d of the Chancery Rules in New Hampshire, the charging part of the bill may be omitted. In Massachusetts, the plaintiff may, when his case requires it, allege, by way of charge, any particular fact, for the purpose of putting it in issue. 4th Chancery Rule. The model of a bill given in schedule to orders of Aug. 7th, 1852, in England, contains no charging part. See ante, Vol. I. p. 319.

<sup>2</sup> By the 21st Equity Rule for the United States Courts, the plaintiff is at liberty, at his option, to omit what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to Equity, and that the defendant is without any remedy at law. So the plaintiff may omit this clause by the 3d of the Chancery Rules in New Hampshire. A precise averment of jurisdiction in the Court is now obsolete in England, and was never absolutely requisite. See ante, Vol. I. p. 377.

<sup>3</sup> By the 3d of the Chancery Rules in New Hampshire, the plaintiff may omit the

confederates, when discovered, may, *upon their several and respective corporal oaths*, to the best and utmost of their respective knowledge, remembrance, information, and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid [*or if an answer on oath is meant to be waived, omit the words in italics, and insert at this place, (your orator, or, the plaintiff, hereby waiving, pursuant to the statute, the necessity of the answer of such defendants, being put in under the oaths of the said defendants, or the oath of either of them)*], and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto, and more especially that they may, in manner aforesaid, answer and set forth whether, &c. [*Here insert the interrogatories to be answered by the defendants, directing what interrogatories are to be answered by each.*]

Or, in the Circuit Court of the United States thus :

“To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer, that is to say —

“1. Whether, &c.

“2. Whether, &c.”<sup>1</sup>

prayer for an answer and for answers to interrogatories, except where he relies on the discovery of the defendant. In Maine, “A general interrogatory only shall be introduced into the bill, and it shall be sufficient to require a full answer to all the matters alleged.” 1st Chancery Rule. And by 5th Chancery Rule in Massachusetts: — “Upon the general interrogatory contained in the bill, the defendant shall be required to answer fully, directly, and particularly to every material allegation or statement in the bill, as if he had been thereto particularly interrogated.” By the 4th Rule, in this State, it is required that the bill shall conclude with a general interrogatory. But when his case requires it, the plaintiff may propose specific interrogatories. It is now precisely enacted, in England, “that the bill of complaint shall not contain any interrogatories for the examination of the defendant.” 15 & 16 Vict. c. 86, § 10; but by § 12, if the plaintiff, in a suit commenced by bill, shall require an answer, he may file interrogatories in the proper office of the Court, and no defendant shall be required to put in any answer to a bill unless interrogatories have been so filed, &c. See ante, Vol. I. pp. 319, 378, 380.

<sup>1</sup> The 43d Equity Rule of the United States Courts; Story Eq. Pl. § 847, note. By Equity Rule 41, United States Courts, “The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer, shall be specified in a note at the foot of the bill, in the form and to the effect following; that is to say, — “The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3,” &c. See ante, Vol. I. pp. 380, 381, in note.

X. *Prayer for Relief*.<sup>1</sup>

33.

And that an account may be taken by and under the direction and decree of this honorable Court, &c., &c. And that the defendant may be decreed to pay unto your orator [*or the plaintiff*], &c., &c. And that your orator [*or the plaintiff*] may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to your honor shall seem meet.<sup>2</sup>

*A more extended form.*

*Prayer for answer, oath waived—injunction against proceeding at law—declaration of trust—conveyance:* “To the end, therefore, that the plaintiffs may have that relief which they can only obtain in a Court of Equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the plaintiffs, and that the said defendants, who are plaintiffs as aforesaid in the said action at law, may be perpetually enjoined from further prosecuting the same, and that it may be declared that the said lands are charged with a trust in favor of, and ought to be held for, the use and benefit of, &c., and that the said defendants, or so many and such of them as shall appear to have the legal title to the said lands, may be decreed to convey such legal title, free of all encumbrances done or suffered by them, or any or either of them unto the plaintiffs, in their said capacity, to hold to them and their, &c., upon the trusts aforesaid, and for such further or other relief as the nature of this case may require, and to your honors seem meet.” [Earle v. Wood, Bristol Co., reported 8 Cushing, 430.]

34.

*Prayer to restrain proceedings at law, and for an injunction.*] And that the said C. D., &c., their counsellors, attorneys, solicitors, officers or agents may be restrained by an injunction issuing out of this Court, from proceeding further against your orator [*or the plaintiff*] in the said action com-

<sup>1</sup> By the 21st Equity Rule of the United States Courts, “The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief, and, if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for.” In New Hampshire the bill may conclude, “and thereupon the plaintiff prays,” setting forth the special relief to which he supposes himself entitled, “and for such other relief as may be just.” If an injunction or other special order, pending the suit, is required, it may be specially asked for. Rule 3d of Chancery Rules.

In England, the bill concludes with a prayer, specifically for the relief which the plaintiff may conceive himself entitle to, and also for general relief. Ante, 382 *et seq.*

<sup>2</sup> Story Eq. Pl. § 40, note.

menced against him in the &c., Court of &c., and now pending and at issue therein, for the recovery of &c. And that your orator [*or the plaintiff*] may have &c. [*Prayer for general relief.*] May it please your honor to grant unto your orator [*or the plaintiff*] a writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said C. D., &c., &c., commanding them and each of them absolutely to desist and refrain from proceeding further against your orator [*or the plaintiff*] in said action.

## 35.

*Prayer for a ne exeat.*] And that the said defendants may be stayed by a writ of *ne exeat regno* from departing out of the jurisdiction of this Court. And your orator [*or the plaintiff*], &c. [*Prayer for general relief.*] May it please your honors to grant unto your orator [*or the plaintiff*] a writ of *ne exeat regno*, staying the said C. D. and E. F., or either of them, from departing into parts beyond this State, and out of the jurisdiction of this Court, without leave first had.

Or, thus : [*Modern English Form.*]

*Charges and prayer in a bill to obtain a writ of ne exeat.*] The defendant, C. D., is a natural born British subject, but he is possessed of large estate in the Island of St. Croix, and is permanently settled, and has his fixed place of abode in the said Island, which is out of the jurisdiction of this Court.

That the defendant is now, and has for some time been on a visit to this country, and is staying at, &c. ; but he means and intends very shortly to leave England, and to return to his residence in the said Island of St. Croix, in which case the plaintiffs charge, that they will be without remedy in the premises [*or in danger of losing their debt or claim*] and altogether deprived and defrauded of the money so justly due and owing to them as aforesaid.

The plaintiffs therefore submit that the said defendant ought to be restrained from quitting this kingdom, and that her Majesty's writ of *ne exeat regno* ought to issue for that purpose.

*Prayer.*

[*After the former part of the prayer.*]

That in the mean time the defendant — may be restrained by her Majesty's writ of *ne exeat regno*, issuing out of and under the seal of this honorable Court, from leaving the kingdom [*or from going to any part beyond the seas, or to Scotland, without the leave of this honorable Court*], and that the said writ may be marked with the sum of \$——, as a direction for the Sheriff to take bail therein.

## 36.

*Prayer for an account of rents and profits of mortgaged premises, and sums received by mortgagee in possession.*] And that an account may be taken of the rents and profits of the said mortgaged premises, which have been received by the said defendant, since his possession thereof as aforesaid, or which, but for his wilful default or neglect, might have been so received; and also an account of all other the sums, which have been received by the said defendant in or towards satisfaction of the said mortgage money.

## 37.

*Prayer for the production of Deeds, Papers, &c.*] And that the said defendants may set forth a list or schedule, and description of every deed, book, account, letter, paper, or writing relating to the matters aforesaid, or either of them; or wherein or whereupon there is any note, memorandum, or writing, relating in any manner thereto, which now are, or ever were, in their or either, and which, of their possession or power, and may deposit the same in the office of the clerk [*or in the hands of one of the masters*] of this honorable Court, for the usual purposes; and otherwise that the said defendants may account for such as are not in their possession or power.

## XI. Conclusions.

## 38.

*Prayer for subpoena.*<sup>1</sup>] May it please your honors to grant unto your orator [*or the plaintiff*] a writ of subpoena, to be directed to the said C. D.,<sup>2</sup> &c., thereby commanding them and each of them, at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable Court [*or your honors in this honorable Court*], and then and there full, true, direct and perfect answer make to all and singular the premises, *and further to stand to, perform, and abide such further order, direction and decree therein as to this honorable Court* [*or, to your honors*] *shall seem meet* [*or, as shall seem agreeable to Equity and good conscience.*<sup>3</sup>

<sup>1</sup> By 3d of the Chancery Rules in New Hampshire, the prayer for process, unless some special process or order shall be required, may be omitted. In England the bill contains no prayer for process. All that is required is, that the names of the defendant should be set forth, and a note appended with the names of the solicitors for the plaintiff. Ante, Vol. I. p. 390 *et seq.*, and notes.

<sup>2</sup> By 23d Equity Rule of United States Courts: — "The prayer for process of *subpoena* in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the Court may take order thereon as justice may require, upon return of the process."

<sup>3</sup> The part in italics must be omitted in bills merely for *discovery*, or to *perpetuate the testimony of witnesses*. Story Eq. Pl. § 44, note; Barton's Suit in Eq. 43, note (1); Equity Drafts. 6.

## 89.

*Prayer for Process where the Government is a defendant.]* And may it please your honors, that the District Attorney of the United States for the District of —, [or the Attorney-General of the State of —,] on being attended with a copy of this bill, may appear and put in an answer thereto, and may stand to and abide such order, direction and decree in the said premises as to your honors shall seem meet.

## 40.

*Prayer for injunction and for subpoena.]* May it please your honors, to grant unto your orator [or to the plaintiff] not only a writ of injunction, issuing out of, and under the seal of this honorable Court, to be directed unto the said C. D., &c., &c., to restrain them, their servants, workmen and agents, from committing waste, &c., but also a writ of subpoena, &c. [*As in No. 38.*]

## 41.

*Prayer for ne exeat and subpoena.]* May it please your honors, the premises considered, to grant unto your orator [or the plaintiff] not only a writ of *ne exeat regno*, issuing out of and under the seal of this honorable Court, to restrain the said defendant, C. D., from departing out of the jurisdiction of this Court, but also a writ of subpoena, &c. [*As in No. 38.*]

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## CHAPTER II.

### ORIGINAL BILLS PRAYING RELIEF.

#### SECTION I. — *Bills for Specific Performance of Agreements.*

1. *Bill by a vendor against a vendee for the specific performance of a written agreement for the purchase of real estate, the title only being in dispute.*

To &c. [*Address.*]

Humbly complaining, sheweth unto your honors your orator, J. C. of &c., that your orator being seized or well entitled in fee simple of and to a certain messuage or dwelling-house with the appurtenances situate at —, and, hereinafter described, and being desirous of selling such premises, and D. E., of &c., being minded to purchase the same, your orator and the said D. E., on or about the — day of —, entered into and signed a memorandum of agreement respecting the said sale and purchase in the words and to the purport and effect following, that is to say, [*stating the*

*agreement verbatim,*] as by the said memorandum of agreement, to which your orator craves leave to refer, when produced, will appear. And your orator further shows<sup>1</sup> that the said D. E. paid to your orator the sum of \$1,500, part of the said purchase-money at the time of signing the said agreement. And your orator has always been ready and willing to perform his part of the said agreement, and on being paid the remainder of his said purchase-money with interest, to convey the said messuage to the said D. E., and his heirs, and to let him into the receipt of the rents and profits thereof, from the time in the said agreement in that behalf mentioned; and your orator hoped that the said D. E. would have performed the said agreement on his part as in justice and equity he ought to have done. BUT NOW SO IT IS, may it please your honors, that the said D. E. alleges that he is, and always has been, ready and willing to perform the said agreement on his part in case your orator could have made, or can make a good and marketable title to the said messuage and premises, but that your orator is not able to make a good title thereto; whereas your orator charges that he can make a good title to the said messuage and premises. To the *end* therefore that the said D. E. may true answer make to the premises aforesaid, and more particularly that he may answer and set forth in manner aforesaid, whether, &c. [*Interrogating to the stating and charging parts.*] And that the said D. E. may be compelled by the decree of this honorable Court specifically to perform the said agreement with your orator, and to pay to your orator the remainder of the said purchase-money with interest for the same from the time said purchase-money ought to have been paid, your orator being willing, and hereby offering specifically to perform the said agreement on his part, and on being paid the said remaining purchase-money and interest to execute a proper conveyance of said messuage and premises to the said D. E., and to let him into possession of the rents and profits thereof from the said — day of —. And that your orator may have such further and other relief in the premises as to your honors shall seem meet and this case may require; may it please your honors, &c. [*Prayer for subpoena, as in Form 38, ante, p. 1906.*]

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2. CHARGE. *In a bill by a purchaser against the vendor, for the specific performance of a contract for sale of a freehold estate, the plaintiff charges that a part of the purchase-money has remained unproductive in his hands.*

And your orator further sheweth, that previously to the signing of the

<sup>1</sup> By the 7th Chancery Rule in New Hampshire, it is provided that "the idle repetitions," "your orator further complains," "your orator further sheweth to your honors and the like in bills," "shall be omitted, and when the names of parties are omitted they shall be referred to as plaintiffs or defendants."

said agreement, your orator paid unto the said S. B. the sum of \$500, as a deposit and in part of his said purchase-money or sum of \$2,900; and the said S. B. has since delivered up possession of the said purchased premises to your orator. And your orator further sheweth unto your honors, that he has always been ready and willing to perform his part of the said agreement, and, on having a good and marketable title shewn to the said estate and premises, and a conveyance of the fee-simple thereof discharged of all incumbrances made to him, to pay the residue of the said purchase-money or sum of \$2,900, to the said S. B. And your orator hoped that the said S. B. would have specifically performed his part of said agreement as in justice and equity he ought. *But now so it is &c., [See No. 29, p. 1901,]* the said S. B. refuses to perform his part of the said agreement, and to color such refusal, he gives out and pretends that he is unable to make out a good and marketable title to the said estate and premises, and that he is willing to cancel the said contract or agreement, and to repay the said deposit or sum of \$500 to your orator. Whereas your orator charges that the said S. B. is able to make out a good and marketable title to the said estate and premises, if he thinks proper to do so, but that the said S. B. refuses and declines to make out a good and marketable title to the said premises, notwithstanding your orator has required him so to do, and offered to pay him the residue of the purchase-money upon having the title made out and a proper conveyance of the said premises executed to your orator, his heirs and assigns, by the said S. B. And your orator charges that the whole of the residue of the purchase-money of the premises has been ready and unproductive in his hands for completing the said purchase from the time it ought to have been completed by the terms of the said agreement. All which actings &c. *[See form No. 32, p. 1902.]*

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3. CHARGE. *In a bill by first vendee, for a specific performance of an agreement for the purchase of an estate, against a vendor, and a subsequent purchaser from him, the plaintiff charges the subsequent purchaser with notice, and also charges the vendor with acts of waste, and prays for an injunction against both defendants to restrain waste.*

And your orator charges that the said G. K. has since contracted for the sale of the said premises to the said T. P., at an advanced price, and has actually conveyed the said premises or entered into an agreement to convey the same to the said T. P., or to some other person or persons by his order, or to his use, or in trust for him. And your orator charges that the said T. P., at the time he entered into the said contract for the purchase of the said premises, or at the time of the conveyance thereof to him, if the same have been conveyed to him, or at the time of the payment of the purchase-money for the same, if he has actually paid such purchase-money,

well knew or had been informed, or had received some intimation, or had some reason to believe or suspect that the said G. K. had entered into such agreement as aforesaid with the said A. B., or into some agreement with your orator, or with some person on his behalf for the sale of said premises to your orator. And the said T. P., or the agent employed by him in the said purchase or contract, had at some or one of the times aforesaid some knowledge or intimation of the several circumstances aforesaid respecting the said premises, which had passed between your orator and the said G. K., or their solicitors. And your orator charges that the said J. F. was in fact the agent employed in the contract or sale by the said G. K. to the said T. P., as well on the part of the said G. K., as of the said T. P. And your orator further charges that, if, in fact, the said T. P. has paid the purchase-money for the said premises or any part thereof, to the said G. K., the said T. P. has had or taken some indemnity from the said G. K., or some other person in respect of such payment or of such purchase. And your orator further charges that after your orator, by the said A. B., had entered into such agreement with the said G. K., as aforesaid, and after the hay season of this year, your orator verbally agreed with the said G. K., that the hay on the farm should be left by the said G. K., and taken by your orator at an appraisement, but the said G. K. has nevertheless sold and removed the said hay from the farm, to the great injury thereof, and the said G. K. has, since his said agreement with the said A. B., ploughed up more than sixty acres of land, which according to the usual course of husbandry ought to have been laid down with grass. And the said G. K. has also cut down many timber and other trees upon the said premises, and has committed and done other waste and injury thereto. And the said G. K., and also the said T. P., threaten and intend to cut down other trees on and from the said premises, and to commit other waste and injury thereto. All which actings, &c. [*See forms No. 31 and 32, p. 1902, interrogating to the stating and charging parts,*] and that the said defendants may answer the premises; and that the said defendant, G. K., may specifically perform the said agreement so made and entered into by him as aforesaid with the said A. B. as the agent of your orator, your orator being ready and willing, and hereby offering specifically to perform the said agreement in all things, on his part and behalf. And that the said G. K. may be decreed to make compensation to your orator for the waste and other damage done by him to the said premises since the making of the said agreement. And that in the mean time the said defendants, G. K. and T. P., may be restrained by the order and injunction of this honorable Court from cutting down any timber or other trees upon the said premises, or from committing any other waste thereon. [*And for further relief &c.*] May it please &c. [*Pray subpoena and injunction against G. K. and T. P. See forms No. 38 and 40, pp. 1906, 1907.*]

4. *Bill by lessee against lessor for specific performance of a written agreement for a lease of a house.*

Humbly complaining, sheweth unto your honors your orator A. B., of &c.; that C. D. of &c., (the defendant hereinafter named,) being or pretending to be seized or possessed of a messuage or tenement situate &c., and being willing and desirous to let the same, he, in the month of &c., proposed and agreed to grant unto your orator a lease of the aforesaid premises with the appurtenances, and thereupon your orator and the said C. D. duly executed or subscribed a certain memorandum or agreement, bearing date &c. [*stating the agreement*] as in and by &c. And your orator further sheweth that in expectation and full confidence that a lease would have been made and executed to him of the said messuage or tenement and premises, pursuant to the terms of the said agreement, your orator has laid out sundry sums in repairs on the said premises to a considerable amount. And your orator further sheweth that your orator has been always ready to perform his part of the said agreement, and to accept a lease of the said premises pursuant to the terms thereof. And your orator for that purpose caused a draft of a lease to be drawn pursuant to the terms of the aforesaid agreement, and tendered the same to the said defendant for his perusal and approbation, but he refused to accept or peruse the same. And your orator further sheweth that he has frequently by himself and his agents applied to the said C. D., and in a friendly manner requested him to make and execute unto your orator a lease of the said messuage or tenement and premises conformably to the said agreement. And your orator well hoped, &c. *But now so it is,* [*See form No. 29, p. 1901,*] defendant pretends that no such agreement as aforesaid was ever made or entered into by or between the said defendant and your orator, or any agreement, or that he consented to grant a lease to your orator of the aforesaid messuage or tenement and premises. Whereas your orator charges the contrary of said pretences to be the truth, and so the said confederate will at other times admit; but then he pretends that he has been always ready and willing to make and execute a lease of the said messuage or tenement and premises, pursuant to the terms of the said agreement and in all respects to perform the same on his part. Whereas your orator charges the contrary thereof to be the truth. But nevertheless the said defendant refuses to comply with your orator's aforesaid requests to perform or fulfil the aforesaid agreement. All which actings, &c. [*See form No. 31, p. 1902.*] And that the said agreement may be specifically performed and carried into execution, and that the said defendant may be decreed to execute a lease of the aforesaid messuage or tenement and premises to your orator according to the terms of the aforesaid agreement, your orator hereby offering to execute a counterpart thereof, and in all other respects to perform

his part of the said agreement, [*and for further relief see form No. 33, p. 1904.*] May it please your &c. [*Pray subpoena against C. D.*]

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5. *Bill for specific performance of an agreement to convey real estate, against an administrator and minor children.*

To the Honorable, &c.

A. B., of &c., humbly complaining, sheweth that C. D., of &c., &c., being seized and possessed of a certain parcel of real estate, situate, &c., (*give the description and boundaries,*) entered into a written agreement with the plaintiff for the purchase and sale thereof, as follows, viz.: (*state the agreement*) [*or a copy of which agreement is hereto annexed,*] as by the said agreement, which the plaintiff has here in Court ready to be produced, and to which he craves leave to refer, will appear, [*or as by said agreement hereto annexed will appear.*] And the plaintiff further shows that, pursuant to the said agreement, he has paid the taxes on the said premises for the year, &c., amounting to the sum of \$——. And the plaintiff further shows, that, since the making of the said agreement, to wit, on the, &c., the said C. D. died intestate, and that during his lifetime he never made any conveyance of the said premises to the plaintiff, that the said C. D. left a widow, M. A. D., and four children, viz.: M. D., L. D., M. A. D., and J. D., all of whom are minors under the age of twenty-one years, and the sole heirs of the said C. D. That S. K., of &c., Esq., has been duly appointed administrator of the goods and estate, which were of the said C. D.; but no person, as yet, has been appointed guardian of the said minor children. And the plaintiff further shows that he is desirous of obtaining a conveyance of the said real estate, pursuant to the terms of said agreement between the plaintiff and the said C. D. deceased, and is willing and ready to pay therefor the price stipulated in the said agreement in cash, or to give his note of hand, secured by mortgage of the premises, as is provided in the said agreement, and further that he is willing to waive any claim which he has upon the heirs of the said C. D., or upon his administrator, to advance the sum of \$——, upon the erection by him of two dwelling-houses on the said real estate, as the said C. D. agreed that he would do. And the plaintiff further shows that he has made application to the said M. A. D., the widow of said C. D., and ascertained that she is willing to release to the plaintiff her dower in the premises, upon having the interest of one third part of the purchase-money secured to and paid to her during the period of her natural life, or having paid to her an amount equal to the present value of her said life interest. But by reason that the said C. D. died intestate, there is no person who has legal authority to execute a deed, whereby to convey to the plaintiff the fee of the said real estate,

of which the said C. D. died seized. In consideration whereof &c. *To the end, therefore*, that the said S. K., the said M. D., the said L. D., M. A. D., and J. D. may, upon their several and respective oaths, &c., &c., [*See form of interrogating part, ante, No. 32, p. 1902,*] and that the said S. K., and the said M. D., L. D., M. A. D., and J. D., may be decreed specifically to perform the said agreement entered into by the said C. D. with the plaintiff, the plaintiff being ready and willing and hereby offering specifically to perform the said agreement on his part, and that the plaintiff may have such other and further relief &c., &c. (*Prayer for a subpoena.*)

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6. *Allegations and prayer in a bill for specific performance of a parol agreement, the plaintiff relying upon part performance, according to the modern English form.*

(*The bill stated the lease under which the plaintiff claimed, and negotiations for purchase by the defendant.*)

On the — day of — it was agreed by and between the plaintiff and defendant, that the defendant should give the plaintiff \$—— for the purchase of the plaintiff's term and interest in the said leasehold premises under the said lease, he, the defendant, taking the plaintiff's title, such as it was, and the plaintiff consenting to do certain works to the premises, which the defendant then specified (that is to say), &c.

(*Subsequent correspondence and statement of the works required by the defendant to be performed to the premises.*)

The plaintiff, in pursuance of the said agreement so entered into between the plaintiff and defendant as aforesaid, performed all the works so agreed to be performed by him to the premises; and the plaintiff, in pursuance of the said agreement, and in full faith and reliance that it would be performed on the part of the defendant, permitted the defendant to enter into, and he did accordingly on &c., enter into and remain in possession of the said premises.

The defendant, however, now refuses to perform the said agreement on his part, and he alleges that no contract has been entered into by or between the plaintiff and defendant for purchasing the said premises for the term and interest of the plaintiff therein, under and by virtue of the said indenture of lease; whereas the plaintiff charges the contrary thereof to be truth.

The defendant, at other times, alleges that he has not accepted the title of the plaintiff as shewn by said indenture of lease; whereas the plaintiff charges that the defendant has accepted the plaintiff's title to the premises, and has so admitted to the plaintiff and to other persons.

[*Charge as to documents.*]

*Prayer.*

The plaintiff prays as follows:—

1. That the agreement so made or entered into by or between the plaintiff and defendant for the purchase of the term and interest of the plaintiff in the said leasehold messuage and premises may be specifically performed by the defendant, the plaintiff being willing to perform the same so far as it remains on his part to be performed.

2. That proper directions may be given for settling an assignment of the said premises to the defendant for the remainder of the plaintiff's term therein, with a proper covenant therein to indemnify the plaintiff against the payment of the rent and observance of the covenants respectively reserved and contained in the said indenture of lease; and that the defendant may be decreed to execute such assignment or a counterpart thereof, and that upon the execution of the assignment by the plaintiff, the defendant may be decreed to pay the said purchase-money of \$—— to the plaintiff, together with interest at the rate of \$—— per centum per annum from, &c., together with the costs of this suit.<sup>1</sup>

3. [*For further relief &c.*]

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7. *Prayer of a bill by a surety to compel a specific performance of an agreement to execute a mortgage to indemnify the plaintiff from all liability; praying also for a writ of ne exeat regno.*

And that the defendant may be decreed specifically to perform the said agreement, and to make a mortgage to the plaintiff of the said estate and premises to indemnify him against the obligation he has entered into in the Admiralty Court as hereinbefore mentioned. And that it may be referred to a master to settle such conveyance if the parties should differ about the same. And that the defendant may be restrained from going out of the jurisdiction of this honorable Court, into parts beyond the seas or into ——, and that for that purpose a writ of *ne exeat regno* may be issued out of and under the seal of this honorable Court to restrain the defendant from going out of the State [*or Commonwealth*] of &c., [*or into parts beyond the seas, or out of the jurisdiction of this honorable Court.*] [*General relief.*]

<sup>1</sup> In a bill, as well as claim, by a vendor against a purchaser for a specific performance of an agreement, if the plaintiff relies upon an acceptance of title by the defendant, as a ground for dispensing with the usual inquiry as to title, there must be a specific charge to that effect, although the facts and circumstances stated in the bill should warrant the conclusion that the title has been accepted. *Clive v. Beaumont*, 1 De G. & S. 397; *Gaston v. Frankum*, 2 De G. & S. 561.

8. *A bill to enforce the specific performance of a contract to make a policy of insurance.*

To the Judges of the Circuit Court of the United States, for the District of Massachusetts.

The Union Mutual Insurance Company, a corporation duly established by the laws of the State of New York, doing business at the City of New York, in the State of New York, bring this their bill of complaint against The Commercial Mutual Marine Insurance Company, a corporation duly established by the laws of the Commonwealth of Massachusetts, doing business at the City of Boston in said Commonwealth.

And thereupon your orators complain and say, that in and by their charter and by the laws of the State of New York, they were, on the second day of November, eighteen hundred and fifty-three, and ever since have been, authorized and empowered to make insurance, among other things, against loss by the perils of the seas and against loss by fire; that your orators on the said second day of November, underwrote and caused one D. McKay to be insured for whom it might concern, payable in the event of loss to the said McKay, on one eighth of the good ship Great Republic, the said ship having been valued at one hundred and seventy-five thousand dollars, the sum of twenty-two thousand dollars, for the term of one year at and from the second day of November, eighteen hundred and fifty-three, at noon, until the second day of November, eighteen hundred and fifty-four, at noon, against loss from sundry designated risks, and especially from loss from the perils of the seas and from loss by fire, as will more fully appear from a copy hereunto annexed and made a part of this bill, of the policy issued by your orators to the said D. McKay.

Your orators further say, that thereafter the aforesaid insurance so made by your orators upon the Great Republic, and on the night of the twenty-sixth of December, eighteen hundred and fifty-three, the said ship was totally destroyed and lost by fire, one of the perils insured against; that your orators thereupon became liable to pay, and thereafter such loss did pay to the said D. McKay the full sum of twenty-two thousand dollars, the amount so as aforesaid by your orators underwritten.

Your orators further say that after they had insured the said McKay, as aforesaid, and before the loss aforesaid of the said ship, and before the commencement of the fire by which its destruction was produced, your orators requested and authorized Charles W. Storey, of Boston aforesaid, insurance broker, to cause and procure your orators to be reinsured in the sum of ten thousand dollars upon the said Great Republic, for the term of six months, against all and singular the risks by your orators theretofore assumed, and especially against loss from the perils of the seas and from fire.

Your orators further say, that the said Charles W. Storey, as the agent of your orators, in that behalf duly authorized and in their name and behalf, on Saturday, the twenty-fourth day of December, eighteen hundred and fifty-three, made application to the said defendants for the reinsurance by them of your orators upon the said Great Republic, in and for the sum of ten thousand dollars, for the term of six months from the twenty-fourth day of December aforesaid, against such risks as your orators had assumed, and especially against loss from the perils of the seas and against loss from fire ; that the said application so made by the said Storey was made at the office and usual place of business of the said Commercial Mutual Marine Insurance Company in Boston ; that it was so made in the first instance to the secretary of the defendants, and immediately thereafter, and on the day last aforesaid, to George H. Folger, the President of the defendants, who was duly authorized to receive and act thereupon for the defendants.

Your orators further say, that upon the making of the said application, the said George H. Folger, after consulting and advising with some person then present, whose name is to your orators unknown, replied to the said Storey, that the defendants would reinsure your orators, in the sum of ten thousand dollars, upon the said Great Republic, and would assume the risks proposed for the term of one year, at and for a premium of six per cent upon the sum to be underwritten ; that they would insure against the said risks for the term of six months at and for a premium of three and one half of one per cent upon the sum to be insured.

Your orators further say, that the said Storey, immediately thereafter the said application, communicated to your orators the terms upon which the said defendants would reinsure your orators upon the said Great Republic.

Your orators further say, that on the said twenty-fourth day of December, your orators upon being advised by the said Storey as aforesaid, directed, authorized, and requested the said Storey, in the name and behalf of your orators, to accept the terms aforesaid, for six months, and to procure for your orators a reinsurance, in accordance therewith, from the twenty-fourth of December aforesaid.

Your orators further say, that the said Storey as agent, and in behalf of your orators, on Monday, the twenty-sixth day of the said December, at or about eleven o'clock before noon, at the place of business of the said defendants in Boston, and before any loss or damage had occurred to the said Great Republic, notified the said Folger that your orators had accepted the proposition of the defendants to reinsure your orators for the term of six months from the twenty-fourth of December aforesaid, at noon.

Your orators further say, that on the said twenty-sixth day of December, and before any loss or damage had occurred to said ship, the above-named Storey, in behalf of your orators, embodied in a paper partly printed and

partly written, the terms of the contract of reinsurance, so as aforesaid, on the said twenty-fourth of December, in answer to the aforesaid application, proposed to your orators by the said defendants, and so as aforesaid accepted on the morning of the twenty-sixth of December.

Your orators further say, that the said paper was examined, approved, and retained by the said Folger, he in this behalf acting for the defendants, and by him was, in the name of the defendants, assented to, and thereupon a contract of reinsurance by and between the defendants and your orators was complete and concluded, upon the terms in said paper contained, by force whereof the defendants became and were liable and agreed to and with your orators to pay to them the sum of ten thousand dollars, in the event that the said ship Great Republic should be lost or damaged within six months from and after noon of the said twenty-fourth of December, by the perils of the seas or by fire.

Your orators further say, that the said Folger, in behalf of the defendants, and in their name and behalf, agreed with the said Storey, he acting for your orators, that a policy should be prepared and executed by the said defendants to your orators, at the early convenience of the defendants, and delivered to your orators, containing with other usual and accustomed clauses, the terms of the contract of reinsurance, so as aforesaid concluded by and between your orators and the defendants, and so as aforesaid embodied and set forth in the paper aforesaid.

Your orators further say, that the said Storey, on the twenty-sixth day of December aforesaid, was authorized, ready, and willing in behalf of your orators to pay to the defendants, or secure to their satisfaction, at their election, the premium, so as aforesaid agreed upon, on the said reinsurance, but the same was not then paid, because the defendants were accustomed not to receive the premiums by them required in their contracts of insurance until the preparation and delivery of the policies by them agreed to be issued.

Your orators further say, that the said Storey, on the said twenty-sixth day of December, immediately upon the conclusion of the aforesaid contract of reinsurance, advised your orators of its completion.

Your orators further say, that the said Storey, on Tuesday, the twenty-seventh day of December aforesaid, notified the defendants that the said ship had been destroyed by fire and was totally lost, and at the same time asked Edmund R. Whitney, Secretary at the time of the defendants, in the presence and hearing of the said Folger, at the office of the said defendants, if the policy had been prepared for your orators, to which the said Whitney, in the hearing of the said Folger, said no, assigning no reason for the delay, or intimating any refusal to execute such policy.

Your orators further say, that the said Storey, on Wednesday the twenty-eighth of December, called a second time at the office of the defendants

and asked for the said policy, to which the said Folger replied, he was in doubt whether the contract was complete and obligatory, as it was made on a day regarded as Christmas-Day, but he, the said Folger, had not made up his mind about it, and did not want to talk on the subject then.

Your orators further say, that one F. S. Lothrop, on the thirtieth of January, eighteen hundred and fifty-four, in behalf of your orators, made a draft upon the defendants for the sum of nine thousand six hundred and fifty dollars, the amount of said reinsurance, less the premium, payable at sight, to John S. Tappan, your orator's Vice-President, which draft was thereafter, on the first day of February, eighteen hundred and fifty-four, presented to the defendants, which they refused to pay or accept.

Your orators further say, that the said Storey, in behalf and in the name of your orators, in that behalf duly authorized, on the twenty-sixth day of April, eighteen hundred and fifty-four, at the office of the defendants, made demand upon the aforesaid Folger, for the execution and delivery of the policy so as aforesaid by the said defendants theretofore agreed to be by them executed and to your orators to be delivered, and at the same time tendered to the said defendants the sum of three hundred and sixty dollars as and for premium, interest, and cost of policy, with which request the said Folger, in the name of the said defendants and in their behalf, refused to comply.

Your orators further say, that they have applied to the defendants for a copy of the aforesaid paper so left with them on the twenty-sixth of December, which they refused to furnish.

And your orators well hoped that the defendants would have complied with the reasonable requests of your orators.

To the end, therefore, that the said defendants may, if they can, show your orators should not have the relief hereby prayed, and may, according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogations hereinafter numbered and set forth as by the note hereunder written they are required to answer, that is to say : —

1. Whether, upon your information and belief, &c.
  2. Whether, &c.
  3. Whether, &c.
- &c., &c.

And your orators pray that the defendants may discover and produce the original paper or memorandum, so as aforesaid made by said Storey, and dated twenty-fourth of December, eighteen hundred and fifty-three, which was so as aforesaid left with their President at their place of business on the aforesaid twenty-sixth of December.

And that the said agreement of the defendants to execute and deliver to your orators a policy of reinsurance, according to the terms of the afore-

said paper, and in accordance with the defendants' contract of insurance as aforesaid, may be specifically performed, your orators hereby undertaking to perform their undertakings in the premises.

And that the said defendants may be decreed to pay to your orators the sum of ten thousand dollars, the sum so as aforesaid by them reinsured to your orators, with interest thereon. And that your orators shall have such other and further relief as the case may require and as shall seem meet to the Court, and as shall be agreeable to equity and good conscience.

And your orators pray this honorable Court to issue a writ of *subpoena* in due form of law, according to the rules of this Court, to be directed to the Commercial Mutual Marine Insurance Company, a corporation by the law of Massachusetts, at Boston, commanding them on a certain day and under a certain penalty to be and appear before this honorable Court, and to stand to, abide, and perform such order and decree therein as to this Court shall seem meet, and as shall be agreeable to equity and good conscience.

The Union Mutual Insurance Company of New York,  
by C. B. G., *their attorney.*

C. B. G., *counsel.*

[2 Curtis C. C. 524.]

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9. *Substance of a bill for the specific performance of an agreement to convey real estate, and to transfer shares in a corporation, — the agreement being the result of a compromise.*

F. L. and wife v. O. M. F.

The bill alleged that J. F. died on the 22d day of June, 1855, leaving the female plaintiff his sole daughter and heiress, and the defendant, her stepmother, his widow; that on the 9th day of April preceding, he had executed an instrument purporting to be his last will and testament, giving most of his property, real and personal, to the defendant, the provisions of which, as the plaintiffs then and now believed, and had good reason to believe, were induced and brought about by undue influence exercised over him in his last illness, and while he was very weak in body and mind, and the plaintiffs thereupon objected to its probate as his will; that while the probate was pending, on the 8d day of July, 1855, the plaintiffs and defendant compromised the matter by agreeing that the provisions of the will as to them should be set aside, and the testator's real estate, shares in corporations and other personal property be divided between the defendant and the female plaintiff, according to an agreement then executed by them under seal; that the plaintiffs offered to perform their part of the agreement, and to make conveyance and transfers to the defendant according to it, and requested the defendant to convey, according to the agreement, to the female plaintiff the rest of the testator's real estate, stocks, and other personal prop-

erty; but the defendant declined to accept the conveyances tendered by the plaintiffs, or to execute any herself. [*Prayers for relief &c.*<sup>1</sup>]

[*Leach et ux. v. Fobes*, 11 Gray, 506.]

10. *A comprehensive form of a bill by a person entitled to the specific performance of a contract for the sale or purchase of real or personal estate, seeking such specific performance.*

#### SUPREME JUDICIAL COURT.

Essex, ss.

In Equity.

JOHN LEE, . . . Plaintiff,  
HENRY JONES, . . . Defendant.

#### *Bill of complaint.*

To the Honorable, &c.

John Lee, of Lynn, in said county of Essex, merchant, the above-named plaintiff, brings this his bill of complaint against Henry Jones, of Salem, in said county, Esquire, the above-named defendant, and thereupon complains and shows as follows:—

1. That the said Henry Jones, by an agreement in writing, dated on the — day of —, by him subscribed [*or signed,*] a copy of which is annexed to this bill, marked —, agreed to purchase of the said John Lee, the plaintiff, [*or sell to him*] a certain farm [*or messuage, or parcel of real estate*] situate in —, and bounded and described as follows: [*here give the description and boundaries*] [*or one hundred shares in the capital stock of the Eastern Railroad Corporation,*] in the said agreement referred to, for the sum of \$—.

2. The plaintiff has always been ready, and has offered and now offers specifically to perform the said agreement on his part.

3. The plaintiff has made or caused to be made an application to the said Henry Jones, specifically to perform the said agreement on his part, but said Jones has not done so.

The plaintiff therefore prays as follows:—

1. That this Court will declare that the plaintiff is entitled to a specific performance and execution of the said agreement, and will decree the same accordingly.
2. That this Court will decree to the plaintiff his costs of this suit.
3. That the plaintiff may have such further and other relief as the nature of his case requires.

<sup>1</sup> That a Court of Equity has authority to decree a specific performance of a contract to transfer shares in corporations, see *Todd v. Taft*, 7 Allen (Mass.) 371; *Leach v. Fobes*, *supra*; *Cheale v. Kenward*, 3 De G. & Jon. 27; *Clark v. Flint*, 22 Pick. 231.

4. That for the purposes aforesaid, all proper inquiries may be made, accounts taken, and directions given.
5. That a writ of subpoena may issue out of this Court, directed to the said Henry Jones, commanding him to be and appear before this Court [to be holden in and for the county of Essex aforesaid], on a day and under a pain therein specified, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this Court shall seem meet.

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## SECTION II.

### *Bill relating to the Estate of a Married Woman.*

11. *Bill to enforce payment, out of married woman's separate property, of a bond given by her for the price of land conveyed to her for her sole and separate use.*

To the Honorable the Justices of the Supreme Judicial Court &c.

Humbly complaining, sheweth unto your honors A. G. R., of the city and State of New York, that C. M. W., of B., in the county of S., and Commonwealth of Massachusetts, married woman, wife of J. W. W., did, as your orator is informed and believes, on or about the — day of —, A. D. 1855, purchase in her own name and in her own right, an estate of land and buildings, situated in the town of J., in the county of Q., and State of N. Y., of one I. H., then of said town of J.; which said estate consisted of several parcels or pieces of land, as will more fully appear by the deed thereof from said I. H. to the said C. M. W.; a certified copy whereof, from the registry where the same is recorded, your orator craves leave to produce at the hearing of this case.

And your orator further shows, that he is informed and believes that the consideration or price of said estate, purchased by the said C. M. W. as aforesaid, was not less than eighteen thousand dollars, which the said C. M. W. paid, or agreed to pay; and that, as a part of said price or consideration, the said C. M. W. assumed and agreed to pay a mortgage for six thousand dollars on said estate, made by the said I. H. to M. S. and H. S., dated on or about the — day of —, 1854; and that, further, for a portion of said price, or consideration of said purchase, the said C. M. W., together with her husband, the said J. W. W., made and executed to the said I. H. a bond for the sum of six thousand dollars, under seal (a copy

whereof is hereto annexed, marked "A"), and that, to secure the payment of said bond, the said C. M. W., together with her said husband, executed and delivered to the said I. H. a mortgage on said estate before mentioned; which said mortgage, or a certified copy thereof, your orator craves leave to produce in Court at the hearing of this cause.

And your orator further shows, that, on or about the —— day of ——, 1859, he purchased, for a valuable consideration, of the said I. H., the bonds before mentioned, given by the said C. M. W. and her said husband to the said I. H., together with the said mortgage given as aforesaid to secure the payment of the same; which were assigned to your orator by the said I. H., by an assignment in writing duly executed, and delivered by the said I. H. to your orator on or about said —— day of ——, 1859; and your orator became thereby the owner of said bond and mortgage, and the debt and money due from said C. M. W. to the said I. H., and ever since has and still does continue to own and hold the same.

And your orator further shows, that no part of the principal sum, or the interest thereon, of said bond (or of the debt due from the said C. M. W., as aforesaid), has been paid since the same was assigned to him; and he is informed and believes that no part of the principal sum of said bond had been paid before the same was assigned to him; but he is informed that the interest due thereon had been paid up to April, 1857; and there is now due to your orator, as he believes, the whole of the principal sum of six thousand dollars on said bond, and the interest thereon, at the rate of six per cent per annum, from April, 1857, to the present time.

And your orator further shows, that he is informed and believes that the said C. M. W. has not paid said first-mentioned mortgage made by said I. H. to H. S., neither the interest or the principal thereof; but, in consequence of her not paying the same as she had assumed and agreed to do, the holders or holder of said mortgage have foreclosed the same, in the manner and form required by the laws of the State of N. Y.; and, under and in pursuance of such foreclosure, said estate has been sold at sheriff's sale to pay said mortgage; and, as your orator is informed and believes, said estate did not bring at said sale above the sum of seven thousand dollars, which, as your orator is informed and believes, was not enough to pay the amount due on said first-mentioned mortgage.

And your orator further shows, that he is informed and believes that the said C. M. W., together with her said husband, has, since the date of said bond and mortgage given by her to the said I. H., and by him assigned to your orator, sold and conveyed said estate to one W. for a large sum or price, the particulars of which are unknown to your orator.

And your orator further shows, that said estate was conveyed to the said C. M. W., as her sole and separate property, and that she was possessed of it as such; and that, as your orator is informed, she has other sole and

separate property, either in her own name or in the name or in the hands of some person as trustee; and that such property, either in her own name or in the hands of her trustee, ought to be and is holden for and chargeable with the payment of the amount of said bond, and the interest due thereon; and your orator ought to receive and recover the same from the said C. M. W.'s estate.

But now, so it is, may it please your honors, that the said C. M. W. and the said J. W. W., although often requested to pay to your orator the amount due to him upon said bond and mortgage, utterly and wholly refuse and neglect to comply with such request, or to pay to your orator the same, or any portion thereof; all which is contrary to equity and good conscience, and tends to the manifest injury of your orator.

In consideration whereof, and forasmuch as your orator is entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a Court of Equity, where matters of this nature are properly cognizable and relievable; to the end, therefore, that the said C. M. W., upon her corporal oath, may full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated and she thereunto distinctly interrogated, and that according to the best of her knowledge, information, and belief;

And that your honors would order and find the amount due to your orator upon said bond and mortgage, and decree that the same may be paid to your orator out of the separate property of the said C. M. W., standing either in her own name, or in the hands of a trustee; and that your orator may have such other and further relief in the premises as the nature of his case shall require, and to your honors shall seem meet:

May it please your honors to grant unto your orator a writ of subpoena, issuing out of this honorable Court, to be directed to the said C. M. W., thereby commanding her, under a certain penalty therein to be specified, to be and appear personally before your honors at a certain day, then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet: and your orator shall ever pray.

A. G. R.

[Rogers v. Ward, reported, 8 Allen, 387.]

## SECTION III.

*Bill relating to Dower.*12. *Bill for Dower, to set aside release made thereof for Fraud and Imposition — in the United States Circuit Court.*

Humbly complaining, show unto this Honorable Court, your orator Ellick P., of Cincinnati, in the State of Ohio, Esq., and a citizen of the said State of Ohio, and your oratrix, Elizabeth P., now the wife of the said Ellick P., of said Cincinnati, and a citizen of the said State of Ohio, gentlewoman, that the said Elizabeth, who was the widow of R. M., late of M., in the said Commonwealth of Massachusetts, deceased, intestate, wherein the said Ellick and Elizabeth demand against the Monson and Brimfield Manufacturing Company, duly and legally incorporated by that name within the said Commonwealth of Massachusetts, the reasonable or just third part whereof the said Elizabeth is by law dowable according to the true intendment of law, of, and in the following described lands or tenements bounded and described as follows, to wit: [*Description and boundaries.*]

Whereupon your said orator and oratrix complain and say that the said R. H., formerly the husband of your said oratrix, was seized in his demesne as of fee of the aforesaid described lands and tenements during the coverture of the said R. M., with her, your said oratrix, and while she was his wife and was actually in possession thereof.

And your said orator and oratrix further say, that they at said M., on the 3d day of March, A. D. 1823, did make demand and require of the said Monson and Brimfield Manufacturing Company, who then did, and now do claim a right of freehold and inheritance in the before described premises, to assign and set out to her, your said oratrix, her dower or just third part of and in the aforesaid premises.

And your orator and oratrix further say, that since the time of making said demand as aforesaid more than one month hath elapsed, and that the said Monson and Brimfield Manufacturing Company did not within one month next after said demands being made as aforesaid, assign and set out to your oratrix her dower, or any part thereof in the aforesaid premises, and that the said Monson and Brimfield Manufacturing Company, or either of the members thereof, have not done, or caused the same to be done, at any time since, but, on the contrary, they then refused and still refuse so to do.

But now so it is, may it please your honors, that the said Monson and Brimfield Manufacturing Company, being in no wise ignorant of the premises, but contriving and confederating with each other, and with several

other persons to your orator and oratrix yet unknown, in order to wrong and injure your said orator and oratrix, and to prevent your oratrix from having her dower or just third part of and in the aforesaid premises assigned and set out to her according to the true intendment of law.

Your orator and oratrix give your honors to be informed that the said confederates pretend and give out that the said oratrix, during her coverture, and while she was the wife of said R. M., did sign, seal, and deliver some deed, or other instrument in writing whereby she acquitted, released, and discharged all her right of dower in the aforesaid described premises.

Now your orator and oratrix charge the contrary thereof to be true, and, moreover, that the said oratrix never did make any such release or discharge to them, the said Monson and Brimfield Manufacturing Company, as hereinbefore pretended, or if she did give or execute the same, she was grossly deceived and imposed upon in relation thereto, and that the same was obtained from her, or she was prevailed upon to execute the same by unfair means or practices used in that behalf by the said confederates.

And your orator and oratrix further charge and complain that the said pretended release or instrument was procured and brought to the said oratrix, ready drawn and prepared for execution, and that she would not have signed or executed the same, in case she had known or been fully apprized of the real purport, tenor, or contents thereof, nor was any sum or sums of money whatever paid to or received by her, as the consideration for her executing the said pretended release or instrument. Under the circumstances aforesaid, your said orator and oratrix insist that the said pretended release or instrument ought to be delivered up to be cancelled, as having been fraudulently and unfairly, and without consideration, obtained from the said oratrix.

But nevertheless the said confederates insist upon the contrary, and claim the full benefit of the said pretended release or instrument, and threaten and intend, in case your orator and oratrix proceed at law against them touching the matters aforesaid, to set up the pretended release or instrument in bar thereto.

And, also, your orator and oratrix here before your honors insist that the said pretended deed or instrument, in manner and form as the same was signed, sealed, and delivered, was not a discharge or relinquishment of dower of your oratrix in the premises therein referred to, and that the same, by the laws of the land, does not bar or exclude her from such dower or right in the within described lands or tenements.

And your orator and oratrix further complain, and give your honors to be informed, that the said confederates pretend that your oratrix, during the lifetime of her late husband, R. M., and while she was his wife as aforesaid, did join with her said husband in the several deeds of sale and conveyance

by him made, of the said several pieces of land as hereinbefore described, and that your orator, by such joining in the aforesaid deeds of sale and conveyance, has lawfully barred or excluded herself from such dower or right. Now your orator and oratrix, on the contrary, charge and say, that your oratrix did not join with her said husband, R. M., in any deed of sale or conveyance of the before described premises, as they pretend, and that she is not, by the laws of the land, barred or excluded from her said dower or right in or to the within described lands or tenements.

In consideration of all which, and inasmuch as your orator and oratrix cannot have relief in the premises by the plain, direct, and ordinary course of the common law, to the end, therefore, that the said Monson and Brimfield Manufacturing Company, and the rest of the confederates, when discovered, may be holden to account with, or assign and set out to, your orator her dower or just third part in or to the within described premises, your orator and oratrix humbly pray that W. P., E. T. A., J. H., S. W., Jr., G. B., B. S., S. C., and G. T., all of B., in the said District of Massachusetts, gentlemen, W. B., of C., in said District, gentleman, and J. H., Jr., of M., in said District, gentleman, all being proprietors and constituting the Monson and Brimfield Manufacturing Company, and citizens of the said State of Massachusetts; and such other confederates, when discovered, may be called and required severally to answer on oath, fully and particularly, all and singular, the matters herein set forth.

Wherefore, may it please your honors, &c.

G. B.

[*Prayer for subpoena.*]

[*Powell & wife v. The Monson &c. Manuf. Co. 3 Mason, 347.*]

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#### SECTION IV.

##### *Bills respecting the Foreclosure of Mortgages.*

##### 13. *Bill by mortgagee against the mortgagor, for a foreclosure.*

Humbly complaining, shows unto your honors your orator, R. S., of &c., that on the &c., P. J., of &c., [one of the defendants hereinafter named,] being, or pretending to be, seized in fee of a certain parcel of real estate, situate &c., and bounded &c., and having occasion for the loan of a sum of money, applied to your orator to lend him the sum of \$——, and in order to secure the repayment of the same, with interest, proposed to mortgage to your orator the said real estate. And your orator further shows unto

your honors, that your orator did comply with the request of the said P. J., and did accordingly lend him the said sum of \$ —, and for securing the repayment thereof, with interest as aforesaid, by deed, bearing date on &c., and made and executed by the said P. J., did grant, bargain, sell, and convey unto your orator the premises above described: To have and to hold unto your orator, his heirs and assigns, in fee simple forever, subject nevertheless to a proviso for the redemption of the said premises, on payment by the said P. J., his executors, administrators, or assigns, to your orator, his executors, administrators, or assigns, of the said sum of \$ —, with lawful interest for the same, within one year from the date of said deed, as by the said deed, reference thereunto being had, will more fully appear. And your orator further shows, that the said sum of \$ —, or any part thereof, was not paid to your orator or to any person on his behalf, according to the said proviso in said deed at the time therein mentioned, and has not now been paid to your orator, but is still due and owing to him, together with a great arrear of interest thereon. And your orator well hoped that the said P. J. would either have paid your orator the said sum of \$ —, and the interest thereon, or would have suffered your orator to have peaceably and quietly held and enjoyed the said premises, and for that purpose your orator has frequently applied to the said P. J., and requested him to pay the said sum of \$ —, and the interest due upon the same, or else peaceably to deliver up possession to your orator of the said mortgaged premises, together with all deeds, evidences, writings &c., relating to or concerning the same, and to release all his right, title, and equity of redemption of, in, and to the said premises, to your orator and his heirs, the said P. J. well knowing, as your orator charges the truth to be, that the said premises are a very scanty security for the principal and interest now due to your orator thereon. And your orator well hoped that the said P. J. would have complied with such, your orator's reasonable requests, as in justice and equity he ought to have done. BUT NOW SO IT IS, &c. [*See form No. 29, p. 1901.*] And the said defendant, P. J., pretends that the said premises were mortgaged by him to &c., whereas your orator charges that &c. And at other times the said P. J. pretends &c., whereas your orator charges &c. All which actings &c. [*See form No. 31, p. 1902.*] And that the said P. J. may discover whether there is or are any other, and what incumbrance or incumbrances upon or affecting the said mortgaged premises, or if so, in whom the same is or are vested. And that an account may be taken, by and under the direction and decree of this honorable Court, of what is due and owing to your orator for principal and interest moneys upon and by virtue of his said recited mortgaged securities, and that the said P. J. may be decreed to pay and satisfy to your orator what shall appear to be due and owing to him on the taking of the aforesaid account, by a short day to be appointed

by this honorable Court, together with your orator's costs. And in default thereof, that the said P. J., and all persons claiming under him, may be absolutely barred and foreclosed of and from all equity of redemption, or claim, in and to the said mortgaged premises, and every part thereof, and may deliver over to your orator all deeds, writings, and documents whatsoever in his custody, possession, or power, relating to or concerning the said premises and every part thereof, &c. [*And for further relief, see form No. 33, p. 1904.*] May it please, &c. [*See form No. 38, p. 1906.*]

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14. *Bill by a mortgagee for a foreclosure, against the surviving mortgagor, entitled as surviving devisee to the Equity of Redemption, as to one moiety for his own benefit, and as to the other in trust for himself and another individual (also a defendant) as devisees under another will.*

Humbly complaining, shows unto your honors, your orator, A. H. of &c., Esq., against S. M. C. of &c., and G. R. of &c., that J. S. C., now deceased, the said S. M. C., and the Reverend P. K., now deceased, being or alleging themselves to be seized of, and entitled to, the premises hereinafter particularly described, in trust for the benefit of the said J. S. C. and S. M. C., and having occasion to borrow the sum of \$5,500, applied to and requested your orator to lend them the sum of \$3,000, part of such sum of \$5,500, on the security hereinafter mentioned, and that your orator complied with such request and did accordingly lend and advance the sum of \$3,000 to the said J. S. C., S. M. C., and P. K. And that, thereupon, and in order to secure the repayment thereof with interest, the said J. S. C., S. M. C., and P. K. duly executed a certain indenture of mortgage bearing date — and made or expressed to be made between the said J. S. C., S. M. C., and P. K. of the one part, and your orator of the other part. And that thereby, after reciting as therein mentioned, it was witnessed that for and in consideration of the said sum of \$3,000, to the said J. S. C., S. M. C., and P. K. paid by your orator, the receipt whereof they did thereby acknowledge, they, the said J. S. C., S. M. C., and P. K., and each of them, did grant, bargain, sell, and convey unto your orator, his heirs and assigns, all that capital messuage &c., together with all and every the appurtenances &c., to hold the said messuage &c., unto your orator, his heirs, and assigns in fee simple forever, but subject to a proviso for redemption upon payment by the said J. S. C., S. M. C., and P. K., their heirs, executors, administrators, or assigns, unto your orator, his executors, administrators, or assigns, of the said sum of \$3,000, with interest after the rate of 5 per cent per annum at or upon the — day of — then next ensuing; as in and by the said indenture, reference being thereto had, will more fully appear.

And your orator further shows unto your honors, that the said sum of \$ 8,000 was not paid to your orator at the time, for that purpose limited by the said indenture, for the payment of the same, and that thereby the estate of your orator in the said mortgaged premises became absolute at law. And your orator further showeth unto your honors, that in or about the year — the said J. S. C. died, having first made his will bearing date —, whereby he devised all real estate, including his interest in the said mortgaged premises, to the said S. M. C. and P. K., and to G. R. of —, and their heirs. And your orator further shows unto your honors that the said P. K. had no beneficial interest in the said mortgaged premises; and that he died some time since, leaving the said S. M. C. him surviving; and that the said S. M. C. alone is now entitled to the equity of redemption of the mortgaged premises in trust, as to one moiety thereof, for his own use and benefit, and in trust, as to the other moiety, for the use and benefit of himself and the said G. R., as devisees of the said J. S. C. And your orator further shows, that the said sum of \$ 3,000, together with a considerable arrear of interest accrued due thereon, is now due to your orator on the security of the said premises. And that your orator has frequently, and in a friendly manner, applied to the said S. M. C., and requested him to pay the same and to release his equity of redemption of and in the said mortgaged premises. And your orator well hoped that such his just and reasonable requests would have been complied with, as in justice and equity they ought to have been. BUT NOW SO IT IS, may it please your honors, that the S. M. C., combining with the G. R., and contriving how to injure your orator in the premises, refuses so to do, although your orator charges that your orator did as aforesaid well and truly advance and pay the said sum of \$ 3,000, to the said J. S. C., S. M. C., and P. K., and that for securing the repayment thereof with interest, the said J. S. C., S. M. C., and P. K. duly made and executed to your orator such indenture as is hereinbefore mentioned; and that the whole of the said sum of \$ 8,000, together with a large arrear of interest accrued due thereon, is now justly due and owing to your orator on the security aforesaid. And your orator charges that the mortgaged premises are a very scanty security for the repayment of what is due and owing to your orator on the security thereof. And your orator charges that the said G. R. is and claims to be interested in the said mortgaged premises, or some part thereof, and to be entitled to redeem the same, but he, and also the said S. M. C. refuses so to do. And your orator charges that the said defendants ought either to pay what is due to your orator as aforesaid, or otherwise to release their equity of redemption in the said premises, but they refuse so to do. All which actings &c. [*See form No. 81, p. 1902.*] And that the said defendant may answer the premises; and that an account may be taken by and under the direction and decree of this honorable Court of what is

due and owing to your orator for principal money and interest on the security of the said mortgaged premises ; and that the said defendants may be decreed to pay unto your orator what shall appear to be justly due and owing to him on the taking of the aforesaid account, together with his costs of this suit, by a short day to be appointed by this Court for that purpose, your orator being ready and willing, and hereby offering, on being paid his principal money and interest and costs, at such appointed time, to reconvey the said mortgaged premises unto the said defendants, or unto either of them, as this honorable Court shall direct. And in default of such payment, that the said defendants and all persons claiming under them, may be absolutely barred and foreclosed of and from all right and equity of redemption in and to the said mortgaged premises and every part thereof forever. And may deliver up to your orator all and every the deeds, writings, and documents in their or either of their possession, custody, or power, relating to the said mortgaged premises and every part thereof. [*And for further relief, see form No. 33, p. 1904.*] May it please your honors, &c. [*See form No. 38, p. 1906.*] [*Pray subpoena against S. M. C., and G. R.*]

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15. *Prayer in a bill for foreclosure and sale.*

That an account may be taken, by or under the direction of this honorable Court, of what is due for the principal and interest on the said mortgage, and that the said defendants, or some one of them, may pay unto your orator the money which shall be found due to him, by a short day, to be appointed for that purpose by this honorable Court; or, in default thereof, that all the said defendants, and their respective heirs, executors, and administrators, and all other persons claiming, or to claim by, from, or under them, or any of them, may be absolutely barred and foreclosed of and from all right and equity of redemption of, in, and to the said estates and every part thereof; or, if on any account your orator is not entitled to such foreclosure, then that the said estates may be sold, and all proper parties may join therein, and that the money so due to your orator may be paid to him by and out of the money which shall be raised by such sale &c., &c.

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16. *English model form of bill in foreclosure suit, as given in schedule to the orders of 7th August, 1852.*

In Chancery.

JOHN LEE, .	.	.	Plaintiff,
JOHN STYLES	}	.	Defendants.
and			
HENRY JONES			

*Bill of complaint.*

To the Right Honorable Richard, Baron Westbury, of Westbury, in the county of Wilts, Lord High Chancellor of Great Britain.

Humbly complaining, sheweth unto his Lordship, J. L., of &c., the above-named plaintiff, as follows:—

1. The defendant, J. S., being seized in fee simple of a farm called Blackacre, in the parish of A., in the county of B., with the appurtenances, did, by an indenture dated &c., and made between the defendant J. S., of the one part, and the plaintiff of the other part, grant and convey the said farm, with the appurtenances, unto and to the use of the plaintiff, his heirs and assigns, subject to a proviso for redemption thereof, in case the defendant, J. S., his heirs, executors, administrators, or assigns, should, on the first day of May, one thousand eight hundred and fifty-one, pay to the plaintiff, his executors, administrators, or assigns, the sum of five thousand pounds, with interest thereon at the rate of 5 per centum per annum, as by the said indenture will appear.

2. The whole of said five thousand pounds, together with interest at the rate aforesaid, is now due to the plaintiff.

3. The defendant H. J. claims to have some charge upon the farm and premises comprised in the said indenture of &c., which charge is subsequent to the plaintiff's said mortgage.

4. The plaintiff has frequently applied to the defendants J. S. and H. J., and required them either to pay the said debt or else to release the equity of redemption of the premises, but they have refused so to do.

5. The defendants J. S. and H. J. pretend that there are some other mortgages, charges, or incumbrances affecting the premises, but they refuse to discover the particulars thereof.

6. There are divers valuable oak, elm, and other timberlike trees growing and standing on the farm and lands comprised in the said indenture of mortgage, which trees and timber are a material part of the plaintiff's security; and if the same or any of them were felled and taken away, the said mortgaged premises would be an insufficient security to the plaintiff for the money due thereon.

7. That the defendant J. S., who is in possession of the said farm, has marked for felling a large quantity of the said oak and elm trees, and other timber, and he has, by handbills, published on the second December instant, announced the same for sale, and he threatens and intends forthwith to cut down and dispose of a considerable quantity of the said trees and timber on the said farm.

*Prayer.*

The plaintiff prays as follows:—

1. That an account may be taken of what is due for principal and interest on the said mortgage.

two parcels of real estate, bounded and described as follows: [*here insert boundaries, &c.*] And your orator further sheweth, that the said J. G. the elder, and E., his wife, in or about the year —, made some conveyance and assignment of the said premises unto W. B., of &c., the defendant hereinafter named, by way of mortgage for securing the repayment of a certain sum of money, with interest, then advanced to the said J. G. by W. B., or by J. B., then of &c., on the part of, and as the agent of, the said W. B.

And your orator further sheweth unto your honors, that the said W. B., upon or soon after the making of the said security, entered into the possession of the said mortgaged premises, or into the receipts of the rents and profits thereof, and hath ever since continued in such possession and receipt, and the said W. B., or the said J. B., on his behalf, also possessed himself of all the title deeds relating to the said premises. And your orator further sheweth that the said J. G. the elder, departed this life in or about the year —, and that the said E., having survived her husband, departed this life on or about &c., intestate, and without having made, after the death of her said husband, any conveyance or disposition of such right and interest as she retained at his death in the premises, leaving your orator her eldest son and heir-at-law, who thereupon became entitled to the equity of redemption of the said mortgaged premises.

And your orator further sheweth unto your honors, that the said W. B. from time to time made some small payments to the said J. G. the elder, in his lifetime, and after his death to the said E., out of the rents and profits of the said premises; and the said W. B. applied the greater part of such rents and profits to his own use, and by means thereof the said W. B. hath been more than repaid the principal and interest due to him on the security of the said premises. And your orator hath frequently applied to the said W. B., and requested him to come to an account for the rents and profits of the said premises so received by him, and to pay over to your orator what he should appear to have received beyond the amount of the principal and interest due to him, and to deliver up the possession of the said mortgaged premises; and your orator well hoped that the said defendant would have complied with such requests as in justice and equity he ought to have done, but that the said W. B., acting in concert with divers persons unknown to your orator, refuses to comply therewith. **TO THE END, THEREFORE, that, &c.** [*See form No. 32, p. 1902.*]

And that the said defendant may answer the premises, and that an account may be taken of what, if anything, is due to the said defendant for principal and interest on the said mortgage, and that an account may also be taken of the rents and profits of the said mortgaged premises, which have been possessed or received by the said defendant, or by any other person or persons by his order or for his use, or which without his wilful

default or neglect might have been received,<sup>1</sup> and that if it shall appear that the said rents and profits have been more than sufficient to satisfy the principal and interest of the said mortgage, then that the residue thereof may be paid over to your orator; and that your orator may be permitted to redeem the said premises, your orator being ready and willing, and hereby offering to pay what, if anything, shall appear to remain due in respect to the principal and interest on the said mortgage; and that the said defendant may be decreed to assign and to deliver up possession of the said mortgaged premises to your orator or to such person as he shall direct, free from all incumbrances made by him or any person claiming under him, and may deliver over to your orator all deeds and writings in his custody or power relating to the said mortgaged premises. [*And for further relief, see form No. 33, p. 1905.*] May it please, &c. [*See form No. 38, p. 1905.*]

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*19. Bill to redeem by purchaser of an Equity of Redemption from the Assignees in Insolvency of the Mortgagor — alleging possession by the defendants — claiming an account of rents and profits, and money received for losses under Policies of Insurance on the property mortgaged, in Circuit Court of the United States.*

To the Judges of the Circuit Court of the United States, within and for the District of Massachusetts, sitting in Equity:

W. H., of S., in the County of P., in the Rhode Island District, a citizen of the State of Rhode Island, brings this his Bill of Complaint against the President, Directors, and Company of the W. Bank, a Corporation legally created under the laws of the Commonwealth of Massachusetts, and located and transacting business in the City and County of W. in said Commonwealth, all citizens of the State of Massachusetts.

And thereupon your orator complains and says: That one S. H., of N., in said County of W., and Commonwealth of Massachusetts, on or about the fourteenth day of October, A. D. 1839, was seized in fee simple of, or otherwise well entitled to, certain real estate situated in said N., particularly described in certain deeds of conveyance of the same to said S. H., — one from J. F. and S. W., dated December 17, 1821, and one from J. E., dated October 11, 1822, recorded in the Registry of Deeds for the County of W., book 242, page 32; also a deed from J. E. to said H., dated May 3, 1825, recorded in said Registry of Deeds, book 248, page 457, copies of which deeds are hereunto annexed, and made a part of this bill marked —.

<sup>1</sup> If it is intended to claim for waste of the mortgagee in possession, it must be charged in the bill; otherwise there can be no issue in regard to it. *Gordan v. Hobart*, 2 Story C. C. 260, 261. And if the question of waste is not referred to the Master, he cannot consider it, even on the consent of the parties. *Gordan v. Hobart*, *supra*.

And your orator further shows, that the said S. H., on or about said fourteenth day of October, A. D., 1839, made a conveyance of said premises, by way of mortgage, to one H. M. H., of B., in the County of S., and Commonwealth of Massachusetts, to secure the repayment of a sum of money, with interest then due from the said S. H. to the said H. M. H.; and that subsequently and on or about the seventh day of March, A. D. 1847, the said H. M. H. transferred and assigned all his interest in said mortgage deed, and in the premises therein described, and in the debt thereby secured, to the defendants. Copies of said mortgage deed, and of the assignment thereof, are hereunto annexed, marked &c., and made a part of this bill.

And your orator further shows, that after the making of the said transfer, and on the third day of December, A. D. 1849, the said defendants entered into the possession of the said mortgaged premises, or into the receipt of the rents and profits thereof, and hath ever since continued in such possession and receipt.

And your orator further shows, that since the said mortgaged premises have been in the possession of the defendants, the mills and principal buildings thereon have been destroyed by fire, and that the same were insured by the said S. H., who occupied said premises under lease from said defendants for the benefit of said defendants, as further security for said mortgage debt, and that large sums have been paid to said defendants, on said policies, and that they still hold other policies upon the machinery in said mills, which was also destroyed by fire, which policies have been assigned to said defendants as further security for, and in payment of, said mortgage debt, and that the whole amount of said policies is sufficient to cancel the greater part, if not the whole, of the residue of said debt, which has not otherwise been paid by said S. H., and that if a just account were taken of such payments, and of the sums received or to be received on said policies, which are now due and payable, and of said rents and profits received by said defendants, the whole of said mortgage debt would be found to be justly paid and discharged.

And your orator further shows, that on the — day of —, A. D. 184—, the equity of redemption which the said S. H. retained and owned in said property, was transferred to one A. W. P. by assignments in the course of proceedings under the Insolvent Law of said Commonwealth of Massachusetts, to which the said S. H. was a party, and that said A. W. P., as such assignee of said S. H., by his deed dated the 24th day of June, A. D. 1844, conveyed said equity of redemption to your orator, a copy of which deed is hereunto annexed, marked, &c.

And your orator further shows, that being the owner of said right of redemption in said property, he has applied to said defendants and requested them, to come to an account for the rents and profits of the said premises so received by them, and of the moneys received by them from said S. H.,

for the interest and principal of said debt, and from the said policies of insurance, and to deliver up the possession of said mortgaged premises to him, upon being paid what, if anything, should be found to be justly due to them upon said account, which your orator is and has been ready and willing to pay, and is ready to bring the same into Court, if anything shall be found to be justly due to said defendants upon the proper taking of said account. And your orator well hoped that the said defendants would have complied with such requests, as in justice and equity they ought to have done; but the said defendants, acting in concert with divers persons unknown to your orator, refuse to comply therewith, and insist upon holding possession of said estate, and foreclosing your orator's right of redemption therein, and retaining said policies and the amounts received thereon, and said rents and profits, without accounting for the same.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and the said defendants may answer the premises, and that an account may be taken of what, if anything, is due to the said defendants for principal and interest on the said mortgage, and that an account may be taken of the rents and profits of the said mortgaged premises, which have been possessed or received by the said defendants, or by any other person or persons, by their order or for their use, or which, without their wilful default or neglect, might have been received; and also of all sums that may have been paid by said S. H. or others towards the principal and interest of said mortgage debt; and also of the policies of insurance and other securities which the said defendants have received, and of the sums which they have or might have realized therefrom, on account of the principal and interest of said debt, and of the value of such policies and other securities now in their hands, on account of said debt, which they have not sold or turned into money; and that the said defendants be ordered to apply the same to the payment of said debt; and that, if it shall appear that said rents and profits, and the payments and the proceeds of said policies and other securities have been and are more than sufficient to pay the principal and interest of said mortgage debt, that the residue may be paid over to your orator; and that your orator may be permitted to redeem the said premises, your orator being ready and willing, and hereby offering to pay what, if anything, shall appear to remain due, in respect to the principal and interest on the said mortgage; and that the said defendants may be decreed to deliver up possession of the said mortgaged premises to your orator, or to such person as he shall direct, free from all incumbrances made by them, or any person claiming under them, and may deliver to your orator all deeds and writings in their custody or power relating to the said mortgaged premises, and that your orator may have such further and other relief in the premises as the nature of this case shall require, and to your honors shall seem meet;

May it please your honors to grant unto your orator the subpoena of the United States of America, to be directed to the said President, Directors, and Company of the W. Bank, thereby commanding them at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable Court, and then and there to answer all and singular the premises, and to stand to, abide, and perform such order and decree thereon, as to your honors shall seem meet.

W. H.

*By his Solicitors, T. A. J., and B. F. B.  
B. & B., Solicitors.*

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20. *Statements in a bill by an assignee of a mortgagor against the mortgagee, who took an absolute deed of the premises, but as security for a debt; and went into possession and sold the premises to a bona fide purchaser without notice.*

Bill by E. W., of &c., as assignee of N. W., against A. B., of &c., states that, on the — day of —, N. W. was seized of a tract of land in C., containing about eleven acres and a half; that about one acre of this land had been sold and conveyed by N. W. to J. F., who, having mortgaged it back to secure the payment of the consideration money, N. W. had entered for breach of condition, and to foreclose the mortgage; that all but the J. F. acre was incumbered by two mortgages, both held by the defendant; the first being a mortgage from said N. W. to F. W., on which there was then due for principal and interest the sum of \$1,487<sup>32</sup>/<sub>100</sub>, the defendant being the executor and trustee under the will of F. W., in that right holding this mortgage; and the second being a mortgage from N. W. to the defendant, nominally to secure the sum of \$1,200 and interest, but really to secure such sums as might be advanced by the defendant to N. W.; and that on this last-mentioned mortgage there was then due, for such advances, the sum of four hundred dollars.

The bill further states, that at the same time N. W. also owed the defendant, personally, eight dollars <sup>10</sup>/<sub>100</sub>, and to him as agent for the heirs of N. W., senior, the sum of one hundred and thirty-six dollars <sup>71</sup>/<sub>100</sub>; that N. W. was much embarrassed in his affairs, and at the pressing solicitation of the defendant, who was his brother-in-law, and of W. W., his brother, he consented to make a deed of the said land, excepting the J. F. acre, to the defendant, absolute in form, but intended to stand as security for what N. W. thus owed; that the conveyance was made for that purpose only, and the defendant went into possession; that none of the notes held by the defendant were surrendered or cancelled, the same being retained because the land was held as security only; that the defendant was to have the management of the land and receive the rents and profits, and apply them towards

the accruing interest; and if there should be any excess, towards the principal, and that N. W. was to have the right to redeem, at any time when he should be able to do so.

The bill further states, that afterwards the defendant, without any notice to N. W. of his intention to sell, or to purchasers of the nature of his title, sold the land by an absolute title, to *bona fide* purchasers, without notice; and it prays for an account of the rents and profits while held by the defendant, and of the value of the land when sold, and that after deducting the amount for which the land stood as security, the residue may be paid to the plaintiff, who alleges himself to be the assignee, by deed, for a valuable consideration, of all N. W.'s equity in the premises.

[Wyman v. Babcock, 2 Curtis C. C. 386.]

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21. *Bill to have goods redelivered which have been deposited as a security for money lent.*

Humbly complaining, sheweth unto your honors your orator, A. S., of &c., against P. S., of &c., that your orator having occasion for a sum of money for the purposes of his business, made application to said P. S., the said defendant, to lend him the same, and thereupon the said P. S., on or about —, advanced and lent to your orator the sum of \$ —, and in order to secure the repayment thereof with interest, your orator deposited with the said defendant a box of tanned boot legs and tops, which were of the value of \$ — and upwards, and at the same time executed and delivered to the said defendant a bill of sale of the said goods so deposited with him; but it was not meant and intended thereby, either by your orator or the said defendant, that the said transaction should amount to an absolute sale of the said goods to the said defendant, but it was expressly agreed between your orator and the said defendant, that your orator should nevertheless be at liberty to redeem the same. And your orator further sheweth, that, being desirous to redeem the said goods, he has frequently applied to the said P. S., and has offered to repay him the said sum of \$ —, with lawful interest thereon, on having the said goods redelivered to him, with which just and reasonable requests your orator well hoped that the said P. S. would have complied, as in justice and equity he ought to have done. BUT NOW SO IT IS, [See form, No. 29, ante, p. 1901,] &c. TO THE END, &c., [See form No. 32, p. 1902.] And that the said defendant may answer the premises, and that an account may be taken of what is due to the said defendant for principal and interest in respect of the said loan of \$ —, and that upon payment thereof by your orator the said defendant may be decreed and deliver over to your orator the said goods so deposited with

him as aforesaid, [*and for further relief, see form No. 33, p. 1904.*] May it please, &c. [*See form No. 38, p. 1906.*]

22. *Bill to redeem by heir of mortgagor, alleging possession, receipt of rents and profits, commission of waste and actual occupation of part of the premises, by mortgages.*

SUPREME JUDICIAL COURT.

In Equity,  
ESSEX, ss.

JOHN MOORE, . . . . Plaintiff,  
HENRY DIX, . . . . Defendant.

*Bill of complaint.*

To the Honorable the Justice of the Supreme Judicial Court :

John Moore, of Newbury, in said county of Essex, trader, the above-named plaintiff, brings this his bill of complaint against Henry Dix, of Danvers, in said county of Essex, merchant, and thereupon the plaintiff complains and shows as follows :—

1. That Amos Moore, of said Danvers, deceased, the father of the plaintiff, being seized in fee simple of a farm, situate in said Danvers, bounded and described as follows, [*here give description and boundaries,*] called the "Baker Place," did, by a deed of mortgage, dated the first day of May, one thousand eight hundred and sixty, grant and convey the said farm, with the appurtenances, unto the said Henry Dix, and to his heirs and assigns, with the proviso or condition that if the said Amos, his heirs, executors, administrators, or assigns, should, in one year from the date thereof, pay to the said Henry Dix, his executors, administrators, or assigns, the sum of five thousand dollars and interest thereon, agreeably to his promissory note bearing even date with said mortgage deed, the said deed should be void, as by the said deed duly executed, acknowledged, and recorded, and here in Court to be produced, will more fully appear.

2. That the said sum of five thousand dollars and interest was not paid at the time appointed for that purpose.

3. That the said Amos Moore departed this life intestate, on the tenth day of May, 1863, leaving the plaintiff his only child and heir, who thereupon became entitled to the equity of redemption of the said mortgaged premises.

4. That the said Henry Dix entered into the possession of the said farm on the — day of —, and into the receipt of the rents and profits thereof, and still retains the same.

5. That said Amos Moore, in his lifetime, at various different times,

paid to the defendant large sums of money upon and towards the amount of said promissory note and the interest thereon.

6. That the defendant, since he took possession of said farm, has cut large quantities of wood and timber on it and sold the same, and received large sums of money therefor.<sup>1</sup>

7. That the defendant has himself personally occupied a part of the dwelling-house on said farm.<sup>2</sup>

8. That the plaintiff has frequently applied to the defendant and requested him to render a just and true account of the said rents and profits — of the payments made towards the mortgage debt — of the sums received for said wood and timber, and the rent with which the defendant should be charged for his occupation of the said house ; and has offered to pay him any balance there may be justly due on said promissory note and interest, after making the proper deductions and allowances, and has requested him to deliver up the said farm to the plaintiff ; but the defendant refuses so to do.

Whereupon the plaintiff prays as follows : —

1. That an account may be taken of the rents and profits which have been received by the defendant, or which, without his wilful default, he might have received since he took possession of the said premises.

2. That an account may be taken of the sums of money paid to the defendant by said Amos Moore.

3. That an account may be taken of the said wood and timber so cut on the premises and sold by the defendant.

4. That the value may be fixed and an account may be taken of the rent of that part of said house occupied by the defendant.

5. That an account may be taken of what is due and owing upon said promissory note for principal and interest ; and, in taking said account, that rests may be made from time to time, when and as the rents, profits, payments, money received for wood and timber, and the occupation rent shall appear to have exceeded the interest in arrear.

6. That the plaintiff may be declared entitled to redeem said mortgaged premises upon payment of what, if anything, shall be found remaining due to the defendant in respect of the said principal and interest on said promissory note ; and that the defendant may be ordered by a decree of this Court, upon said payment being made to the defendant, or into the hands of the clerk of this Court, to surrender and deliver up possession of said premises to the plaintiff, or in such other manner as he shall appoint or direct.

<sup>1</sup> If it is intended to claim for waste of the mortgagee in possession, it must be charged in the bill ; otherwise there can be no issue in regard to it. *Gordon v. Hobart*, 2 Story C. C. 260, 261. And if the question of waste is not referred to the Master, he cannot consider it, even on the consent of the parties. *Gordon v. Hobart*, *supra* ; ante, 1238, note 5.

<sup>2</sup> See ante, 1237, note 7 ; *Trulock v. Robey*, 15 Sim. 265.

7. That the plaintiff may have such further or other relief as the nature of the case may require.

8. That a writ of subpoena may issue, directed to the said Henry Dix, commanding him to be and appear before this Court, to be holden in and for the county of Essex, on a day and under a pain therein specified, and then and there, full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein, as to this Court shall seem meet.

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## SECTION VI.

### *Bills for Account.*

23. *Bill for an account by brokers employed to purchase stocks, and for injunction against suit. [Modern English Form.]*

[*Title, &c.*]

1. The plaintiff, in the month of —, in the year —, entered into an arrangement with — and — the above-named defendants, that the said defendants should, from time to time, as the brokers of the plaintiff, purchase on his behalf certain foreign stock or securities, then commonly called or known by the names, &c., the price or purchase-money of which the defendants were to advance; but the plaintiff engaged on each transaction to deposit with the said defendants certain securities, that is to say, &c.

[*The bill then proceeds to state that purchases had been made, moneys paid and advanced on both sides, and securities given by the plaintiff to the defendants, and that the defendants had sold certain Spanish debentures and scrip of the plaintiff at a lower price than they ought to have done, without the plaintiff's consent.*]

3. The accounts in respect of the before-mentioned transactions and dealings are still open and unsettled; nevertheless, the defendants have commenced and are prosecuting an action at law against the plaintiff for the recovery of the sum of \$ —, which they allege is the balance or sum of money coming to them in respect of said transactions.

4. The plaintiff, however, charges, that if the accounts between the plaintiff and defendants were properly taken, a considerable balance would be coming from the defendants to the plaintiff.

5. The said accounts cannot be properly taken except in a Court of Equity.

The plaintiff prays as follows:—

1. That the defendants may make a full and true discovery and disclosure

of and concerning all and singular the transactions and matters aforesaid, and that an account may be taken by and under the direction and decree of this honorable Court, of all dealings and transactions between the plaintiff and the defendants.

2. That in taking such account the defendants may be charged with the amount of dividends or coupons which were due on the said Spanish debentures at the time of the aforesaid alleged sale thereof by the said defendants, and also with such sums of money as would have been produced by the sale of such debentures, if the same had been sold at the price or rate of 60% per each 100% of the said stock.

3. That in taking such account the defendants may not be allowed to charge the plaintiff with any sums of money which shall appear to have been paid or applied by them in the purchase of stocks or securities which were never actually transferred or delivered to the said defendants.

4. That the defendants may be charged with all benefit and advantage obtained by them in the said transactions of buying and selling, for and on account of the plaintiff, beyond the amount of the usual and regular commission or brokerage.

5. That the balance which shall be found due upon taking such account may be paid by the defendants to the plaintiff, the plaintiff being ready and hereby submitting to pay to them any balance which shall be found due from him to the said defendants on the aforesaid accounts.<sup>1</sup>

6. That in the mean time the said defendants may be restrained by the order and injunction of this honorable Court from further proceeding in the said action at law commenced by them against the plaintiff as aforesaid, and from commencing or prosecuting any other action or proceedings at law against the plaintiff in respect of or concerning the matters aforesaid or any of them.<sup>2</sup>

<sup>1</sup> Although usual, it seems, according to *Clarke v. Tipping*, 4 Beav. 588, not to be necessary for the plaintiff to submit to account. But see *Inman v. Wearing*, 3 DeG. & Sm. 731; *Knebell v. White*, 2 Y. & C. Exch. 15.

<sup>2</sup> A general allegation, that the accounts are of an intricate nature, is insufficient to entitle the plaintiff to maintain a bill for an account, but it must be supported by specific statements of facts showing the intricate and complex nature of the accounts. *Padwick v. Hurst*, 23 L. J. 657, 18 Beav. 578, M. R. In *Phillips v. Phillips*, 9 Hare, 471, a demurrer to a bill for an account was allowed, inasmuch as it did not appear that the account between the plaintiff and the defendant was mutual, or that the payments forming one side of the account were other than matters of set-off as against the receipts on the other side, and notwithstanding a statement in the bill that the defendant had in a particular transaction acted as the agent of the plaintiff in receiving moneys on his account. See, also, *Foley v. Hill*, 1 Ph. 398; 2 H. L. C. 28; *Flicker v. Taylor*, 3 Drew, 183; *Bartlett v. Parks*, 1 Cushing, 82. As to a bill for account by one tenant in common against another, see *Leake v. Cordeaux*, 4 W. Rep. 806; *M'Mahan v. Burchell*, 2 Ph. 127.

24. *Substance of a bill by an administrator of a cestui que trust, for an account and payment of moneys received by the trustee for timber cut from the land held in trust and sold by him.*

**Aaron Phillips v. Sarah G. Allen.**

The bill sets forth that the plaintiff is administrator of the estate of G. A. A., deceased, who was the minor child and sole heir of A. A., deceased; that R. A., deceased, by his will, devised to his wife, the defendant, the rents, profits, income, and improvement of all his real estate during the time she should remain his widow, with remainder in fee, of a portion of the land, to his son G. F. A., in trust, for the benefit of A. A. during his life, and after his death to convey the same in fee to the lawful issue that he might have born to him after the date of the will; and providing further, in said will, that, as G. F. A. was then a minor, the defendant should execute the trust as long as she lived. The bill further alleges that S. D. A. was the mother and sole heir of G. A. A., and that she also had died, leaving the plaintiff her father and sole heir;<sup>1</sup> that after the death of A. A. and G. A. A., the defendant duly accepted the trust, gave bond, and entered upon the discharge of the same; that S. D. A., in her lifetime, exhibited a bill of complaint against the defendant to compel the conveyance of the estate, subject to the defendant's life estate; and after the death of said S. D. A., the plaintiff exhibited a bill of revivor against the defendant, setting forth the facts, on which a decree in his favor was made; that before entering upon the trust, or giving bond for the due performance thereof, the defendant entered upon the land and committed strip and waste thereof, and cut off and sold wood and timber therefrom, to the injury of the inheritance.

The prayer was for an account, and for a decree for the payment of such sum as should be found due, and for further relief.

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25. *Charging part of a bill for a settlement of a partnership account between solicitors; plaintiff impeaching an account which had been furnished by the defendant; lists of omissions and overcharges therein annexed in schedules to the bill.*

And the said defendant pretends that he never agreed to enter into partnership with your orator, nor even subscribed such memorandum of agreement as aforesaid, or any other memorandum of agreement for that purpose; but at other times admitting the contrary thereof to be true. He pretends that he hath constantly, from time to time, duly and regularly accounted with the plaintiff for all the said several sums of money received by him the said defendant on account of the said partnership business, and

<sup>1</sup> The bill is not multifarious by reason of this averment. *Phillips v. Allen*, 5 Allen (Mass.) 85.

the produce, gains, and profits thereof, and that the plaintiff has from time to time received his share and proportion of such moneys and the clear gains or profits thereof, after deducting the necessary outgoings and expenses attending or relating to the said copartnership business, and that all the accounts relating thereto have been regularly adjusted and settled down to the present time. Whereas the plaintiff charges the contrary of such pretences to be the truth, and that no accounts whatever have been ever adjusted or settled between the plaintiff and the said defendant at any time since the commencement of the said copartnership, or in any manner relating thereto or to the business thereof, nor has the plaintiff received any sums or sum of money whatsoever from the said defendant on account of the said defendant's receipts respecting or relating to the said copartnership or the gains or profits thereof, all of which the said defendant will at other times confess. But then he pretends that the plaintiff, from time to time, since the commencement of the said partnership, received from clients and other persons, on account of the said copartnership and the business and profits thereof, sundry sums of money to a large amount in the whole, and greatly exceeding the amount of the several sums received by him, the said defendant, on the same or the like account, and also exceeding the plaintiff's moiety or share of the clear profits or gains of the said copartnership business. Whereas the plaintiff charges the contrary thereof to be the truth; and that the several sums received by the plaintiff on the account aforesaid were trifling and inconsiderable in comparison with the several sums received by the said defendant on the same or the like accounts, and that the said several sums so received by the said defendant greatly exceed his moiety or share of the profits, clear gains, and produce of the said copartnership, and that, upon a fair balance of all accounts relating to the matters aforesaid, the said defendant is justly indebted to the plaintiff in a large sum of money in respect thereof, and so the said defendant knows and has reason to believe and does believe, and so the same would appear in case the said defendant would set forth, as the plaintiff humbly insists he ought to do, a full, true, and particular account of all his receipts and payments on account, or in respect of, or relating to the said copartnership business and the concerns thereof, and would produce all the books of account, and other books and papers in which any entries are made relating thereto, in his custody, possession, or power, but which he nevertheless refuses to do, or to give the plaintiff any account thereof or any satisfaction relating thereto. And sometimes the said defendant pretends that he hath delivered or sent unto the plaintiff a full, true, and just account of all his receipts and payments in respect of the said copartnership and the business or concerns thereof, and he alleges that there are no errors or mistakes therein. Whereas the plaintiff charges that, notwithstanding the said defendant has delivered unto the plaintiff an account, which he pretends to be an account of all his receipts and payments

in respect of the said copartnership from the commencement of the said copartnership, and of the business or concerns thereof, yet the plaintiff charges that the said pretended account is in many respects false, unjust, and untrue, and that there are divers errors, mistakes, omissions, false and improper charges, claims, and particulars therein to the prejudice of the plaintiff, and that the said defendant has moreover inserted and taken credit therein for several sums of money which were not actually paid by him, and also for several other sums which ought not to have been brought into the said account, and with the payment whereof the plaintiff or the said copartnership is by no means chargeable. And in particular the plaintiff charges that the first schedule annexed or underwritten to this his bill contains a list of several of the omissions made or items or articles omitted to be inserted in the said account, to the prejudice of the plaintiff, and that the second schedule hereto annexed also contains a list of several overcharges, or improper charges or items made in the said pretended account so delivered to the plaintiff. All which the said defendant will, at other times, admit; but then he pretends that he has been at all times ready and willing to come to an account with the plaintiff, and to adjust and settle all the accounts relating to the matters aforesaid without suit or litigation. Whereas the plaintiff charges the contrary thereof to be the truth. And the plaintiff further charges that he has by himself and other persons made sundry different applications to the said defendant to come to an amicable settlement of the several accounts aforesaid; but that the said defendant has refused to comply with all such applications and requests.

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## SECTION VII.

### *Bill for Contribution.*

25. *Bill to obtain an adjustment of a general average loss, and payment by the defendants of their contributory shares.*

To the Judges of the Circuit Court of the United States for the District of Massachusetts.

L. L. S., G. M. C., and G. B., of the City, County, and State of N. Y., and W. B. of S., in the State of C., merchants and citizens of the said States, and of the United States; the Sun Mutual Ins. Co., the N. Y. Mut. Ins. Co., and the General Mut. Ins. Co., corporations established within and by the authority of the State of N. Y., and doing business in the city of N. Y., bring this their bill of complaint against T. G. C., G. H., O. E., P. C., W. A., and against D. G. and J. P., copartners; S. A. E., C. H.

M., I. K. M., and P. T. J., copartners, under the firm of C. H. M. & Co., all of B., in the Commonwealth of Mass., and citizens of the U. S., and of the said Commonwealth of Mass.

And thereupon your orators complain and say, that on the — day of —, the said S. C., G. B., and W. B. were owners of a certain vessel, — a barque called the Vernon, — and that the said several corporations were insurers thereon, to the full amount of her value, against the perils of the seas, and other perils in the policies of insurance mentioned; that on the — day of —, said vessel was laden with a cargo of cotton and merchandise, owned by, and consigned to, the said several defendants, as appears by the said several bills of lading, here in Court produced, and made part of this bill; that on said — day of —, said vessel set sail and departed from —, in the State of —, bound for Boston aforesaid; that on the night of the — day of — then next ensuing, said vessel was in Massachusetts Bay, in a heavy gale, and, &c. [*Here describe the circumstances of a voluntary stranding for the safety of the ship, cargo, and lives of those on board.*]

Your orators further show that, afterwards, the cargo on board said vessel was safely landed and delivered to the said defendants respectively, and and that the said vessel was afterwards got off, and the damage occasioned by her being so voluntarily stranded repaired.

Your orators further show that said vessel, her freight and cargo, were in imminent danger, and would in all probability have been totally lost, if the cables had not been slipped, and said vessel run ashore as aforesaid; and that by the said voluntary stranding the same were saved and preserved to the respective owners thereof.

Your orators further allege, that by the said voluntary stranding great damage was done to said vessel, and heavy expenses incurred in consequence thereof, and in getting her off and repairing said damages; and that the owners of said vessel are entitled to demand and receive of the owners of her cargo their respective proportions of the damage, loss, and expenses so incurred, the same being a sacrifice made and incurred by the owners of said vessel, for the common benefit of the vessel, cargo, and freight, and all interested therein.

Your orators further show, that, in consequence of the damage suffered by said vessel as aforesaid, the owners thereof abandoned the same to the said corporations, the insurers thereon, and the said corporations accepted said abandonment, and paid the sums by them respectively insured, and thereby became assignees of, and subrogated to, all the rights of the owners of said vessel, to demand and receive a contribution from the owners of the said cargo for the damages, losses, and expenses incurred for the general benefit.

Your orators further show, that on the — day of — they caused to

be prepared a general average adjustment, showing the amount of the losses, damages, and expenses incurred by reason of the said voluntary stranding, and of the apportionment thereof upon the said vessel, her cargo and freight, and the several owners thereof, and that by said adjustment it appeared that the said T. G. C. ought to pay the sum of \$——; the said P. C., the sum of \$——; the said G. & P., the sum of \$——; the said C. H. M. & Co., the sum of \$——; the said O. E. & Co., the sum of \$——, &c., &c.; and that the said W. A. is entitled to receive the sum of \$——, as will appear by reference to said adjustment, here in Court to be produced, and said several defendants were then respectively requested to pay the sums from them due as aforesaid.

And your orators well hoped that said defendants would have paid the sums so due from them as requested.

But now so it is, may it please your honors, that the said defendants refuse to pay the sums from them respectively due as aforesaid, and pretend that the said vessel was not voluntarily stranded, and that the owners thereof, and their insurers, are not entitled to demand and receive any contribution for the damage sustained by the stranding, and expense of getting off and repairing said vessel, the contrary whereof your orators charge to be true.

Pray subpoena to the said &c., [*the defendants,*] and that they may be ordered and decreed to pay to your orators the sums so due from them respectively, or such other sums as may be found due to your orators, and to stand by, &c.

C. G. L., F. C. L., and C. W. L.,  
*Counsel for Plaintiffs.*

R. C.,  
C. G., T. C., and C. W. L., } *Solicitors.*

[*Sturgess v. Cary*, 2 Curtis C. C. 59.]

## SECTION VIII.

### *Bills by Creditors.*

#### 26. *Bill by simple contract Creditors against the Executors of the deceased debtor, for payment of his debts.*<sup>1</sup>

Humbly complaining, show unto your honors your orators, W. B., of &c., and C. D., of &c., creditors by simple contract of J. F., late of &c., deceased, on behalf of themselves and all other the creditors of the said J. F., who shall come in and seek relief by, and contribute to, the expense of this suit, that

<sup>1</sup> See *Berg v. Radcliff*, 6 John. Ch. 302.

the said J. F., at the time of his death, was justly and truly indebted unto your orator, W. B., in the sum of \$ — and upwards, for goods sold and delivered, and moneys paid, laid out, and expended to and for his use, and that the said J. F. was also justly and truly indebted to your orator, C. D., in the sum of \$ — and upwards, for &c. And your orators further show unto your honors, that the said J. F., in his lifetime, and at the time of his death, was possessed of, or well entitled unto, a considerable personal estate, and being so possessed, departed this life on or about —, having first duly made his last will, bearing date, &c., and thereby appointed J. M. and C. S., [the defendants hereinafter named,] the executors thereof, as in and by the said will or the probate thereof, to which your orators crave leave to refer when produced to this honorable Court, will appear. And your orators further show unto your honors, that the said J. M. and J. S. duly proved the said will in the — Court, &c., and undertook the executorship thereof, and possessed themselves of the personal estate and effects of the said testator to a very considerable extent, and more than sufficient to satisfy his just debts and funeral expenses. And your orators further show unto your honors that the said J. M. and C. S., having possessed themselves of the said testator's personal estate and effects as aforesaid, your orators have made and caused to be made several applications to them the said J. M. and C. S., and requested them to pay and satisfy unto your orators their respective demands, with which just and reasonable requests your orators well hoped that the said J. M. and C. S. would have complied, as in justice and equity they ought to have done. BUT NOW SO IT IS, &c. [See form No. 29, p. 1901.] And the said defendants pretend that the said testator's personal estate was small and inconsiderable, and has already been exhausted in the payment of his funeral expenses and just debts. Whereas your orators charge that the said testator's personal estate and effects were more than sufficient to discharge all his just debts and funeral expenses, and so it would appear if the said defendants would set forth a full, true, and particular account of all and every the personal estate and effects of the said testator come to their or either of their hands or use, and also a full, true, and particular account of the manner in which they have disposed of or applied the same, but which they refuse to do. All which actings &c., [see form No. 31, p. 1902,] and that an account may be taken of the moneys due to your orators in respect of their said several demands, and of other the debts owing by the said J. F. at the time of his death; and that if the said defendant shall not admit assets of the said testator, then that an account may also be taken of the personal estate and effects of the said testator, possessed or received by or by the order, or for the use of the said defendants, or either of them, and that such personal estate may be applied in a due course of administration. And that your orators and the said other unsatisfied creditors, by simple contract of

the said testator, may have such further or other relief in the premises as to your honors shall seem meet, and the circumstances of this case may require. May it please &c. [*See form No. 38, p. 1906.*]

*Pray subpoena against J. M.  
and C. S.*

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27. *Bill by Creditor against Devisees in Trust and Executors of Testator.  
(Modern English Form.)*

In Chancery.

Lord Chancellor.

Vice Chancellor.

Between J. S., (on behalf of himself and all other  
the unsatisfied creditors of W. W., late  
&c., who shall come in and contribute to  
the expenses of this suit,) . . . Plaintiff,  
and

J. A., E. B.<sup>1</sup> and W. B.<sup>2</sup> . . . Defendants.

*Bill of complaint.*

To &c.

Humbly complaining, sheweth unto his Lordship, J. S., of &c., the above-named plaintiff, on behalf, &c.

*Testator indebted to Plaintiff.]* 1. That the said W. W., deceased, was on &c. indebted to the plaintiff in the sum of two hundred and eighty pounds, upon the balance of accounts then settled by and between the plaintiff and the said W. W., deceased.

2. The said W. W., deceased, by his promissory note, dated &c., two months after date, promised to pay the plaintiff the sum of two hundred and eighty pounds.

3. The said last-mentioned promissory note was given to secure the amount due to the plaintiff as mentioned in the first paragraph of this bill.

*Debt still owing to Plaintiff.]* 4. The said sum of \$ — &c. remained justly due and payable to the plaintiff from the said W. W., deceased, at the time of his decease.

*Will of Testator.]* 5. The said W. W., deceased, made his will, dated &c., (and which was duly executed and attested,) and the said testator thereby devised all his real estate and personal estate to the defendants, J. A. and E. B., their heirs, executors, administrators, and assigns, upon trust to sell and collect and get in the same.

[The trusts of the money arising from such sale being declared for the benefit of the defendant, W. B., if he should die before twenty-five years without leaving issue.

<sup>1</sup> There were executors and devisees in trust of real estate for sale.

<sup>2</sup> W. B. was the *cestui que trust*. See *Smith v. Andrews*, 4 W. R. 353.

*Death of Testator.]* 6. The testator W. W. died in &c., without having altered or revoked his said will, leaving the several persons named in his said will him surviving.

*Proof of Will.]* 7. The said will of the testator was duly proved &c., by the defendants J. A. and E. B., who thereby became, and now are, his sole legal personal representatives.

8. The testator was, at the time of his death, indebted to several persons other than the plaintiff.

9. The testator was, at the time of his death, possessed or entitled of or to personal estate of considerable value.

10. The testator also died seized or entitled of or to divers lands, messuages, and other real estate, situate in the county of Gloucester, and elsewhere in England.

*Executors have possessed themselves of Testator's Estate.]* 11. The defendants, J. A. and E. B., have, since the death of the said testator, possessed themselves of the whole of the personal estate of the said testator, and, as the devisees in trust or trustees of said will, they entered into, and are now in the possession or receipt of the rents and profits of his real estate, and they have received a large sum of money in respect of the real and personal estate of the testator.

*Applications.]* 12. The plaintiff has, by himself and his solicitor, made divers applications to the defendants, J. A. and E. B., and requested them to pay what is due to him for principal and interest in respect of his said claim, but they have refused so to do.

13. The said last-named defendants, however, allege that the personal estate of the said testator is insufficient to pay his debts, whereas the plaintiff insists, that if such allegation be true, yet that the personal estate of the testator, together with his real estate, is more than sufficient for payment of all his debts and funeral and testamentary expenses.

14. The said defendants also allege, that the real estate of the testator is subject to certain mortgages or incumbrances, and that they have been unable to sell the said real estate or any part thereof.

15. The defendant, W. B., has attained the age of twenty-five years.

16. The defendant, W. B., claims to be interested in the matters in question in this suit, and insists that he is a necessary party thereto.<sup>1</sup>

### *Prayer.*

The plaintiff prays as follows:—

*An account of Plaintiff's Debt.]* 1. That an account may be taken of what is due to the plaintiff in respect of his said debt so due and owing to

<sup>1</sup> The allegations in this bill, except those which relate to the debt of the plaintiff, can be adapted to the case of a *legatee*. In an ordinary *creditor's* suit, the decree does not go further than direct payment of the testator's debts.

him from the said testator, W. W., as aforesaid, and of all other debts which were owing by the testator at the time of his death, and which still remain unpaid.

2. That the trusts of the said testator's will may be carried into execution by and under the direction and decree of this honorable Court.

*Account of Personal Estate.*] 3. That an account may be taken of the personal estate and effects of the testator received by the said defendants, J. A. and E. B., or either of them, or by any other person or persons, by their or either of their order, or for their or either of their use, and that the said estate may be applied in payment of the testator's debts and funeral expenses, and that the following further accounts and inquiries may be taken and made (that is to say).

*Account of Real Estate.*] 4. An inquiry of or to what real estate the testator was seized or entitled at the respective times of the date of his will and of his death.

5. An inquiry whether any and what incumbrances affect the said testator's real estate.

6. An account of the rents and profits of the said testator's real estate received by the defendants J. A. and E. B., or either of them, or by any person by their or either of their order, or for their or either of their use.

7. That the real estate of the said testator, or a sufficient part thereof may be sold, and that the rents and produce thereof may be applied in payment of the testator's debts.

*That defendants may be restrained from receiving the assets.*] 8. That the defendants J. A. and E. B. may, if necessary, be restrained by the injunction of this honorable Court, from retaining, receiving, or collecting any of the moneys, debts, or other outstanding personal estate of the testator and from receiving the rents and profits of the real estate of the testator, and that some proper person may be appointed to receive all the outstanding personal estate and effects of the testator, and to collect and get in the debts owing to him.<sup>1</sup>

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28. *Bills by creditors on behalf of themselves and all other creditors, parties to a deed of trust, executed by a merchant, who had assigned the moneys due on several policies of insurance upon a ship and her cargo (which had been lost at sea) in trust for the benefit of his creditors — against the trustee, who was also a creditor to a large amount, and had been the merchant's agent in effecting the insurances; charging him with neglect of duty in making some of the insurances, and mismanagement of part of the property assigned, also with having received part of the moneys*

<sup>1</sup> A voluntary covenant for payment of a sum of money is a sufficient debt to support a creditor's suit. *Watson v. Parker*, 6 Beav. 283. See, also, *Lomas v. Wright*, 2 My. & K. 769; *Clough v. Lambert*, 10 Sim. 174; *Tufnell v. Constable*, 7 Adol. & E. 798.

*insured, and applied the same to his own use. Prayer for an account and an equal division of the moneys received by the trustee, and for the appointment of a new trustee in his place.*

To &c.

Humbly complaining, show unto your honors your orators W. R., of &c., T. B., of &c., and A. C., of &c., on behalf of themselves and all other the creditors of J. S., (a defendant hereinafter named) who are parties to the deed of trust hereinafter mentioned, who shall come in and contribute to the expenses of this suit, that in or about the month of October, &c., the said J. S. was the sole owner of a certain ship or vessel called the G. M., and sailed in her as captain or master thereof, on or about the — day of — &c., from Portsmouth to the island of A. & D., in &c., with a considerable cargo on board. And your orators further show unto your honors that the said J. S., previously to his sailing on board the said ship, caused two policies of insurance on the said ship and cargo, to be underwritten by the — Insurance Company, whereby the said ship and cargo were insured at and from L. to A. & D., for \$10,500. And your orators further show unto your honors that in the said voyage from L. to A. & D., the said ship and cargo received damage to the amount of \$510, whereby the said J. S., by virtue of the said two policies of insurance became entitled to receive of the said — Insurance Company the said sum of \$510. And your orators further show unto your honors that M. L. (a defendant hereinafter named) was the agent of the said J. S., who was indebted to the said M. L., and for securing the said debt had given a mortgage of the said ship, and also assigned to him the said two policies of insurance hereinbefore mentioned, which said mortgage and assignment was and were made as well for securing the said debt as such other moneys as the said M. L. might afterwards advance as such agent as aforesaid. And your orators further show unto your honors that the said J. S. having arrived in his said ship at the island of D., and having taken a cargo for the London market, part thereof on his own account, and being about to return home, wrote the following letter to his said agent M. L. (that is to say): [*Informing his agent that he should sail a full ship on or before the 30th of July, and enclosing the bill of lading, and requesting the agent to make the following insurance at the — office, viz. \$ 5,000 upon goods, and \$ 5,000 upon freight.*]

And your orators further show unto your honors that the said J. S., by his agent, the said M. L., also caused a policy of insurance for \$11,000, to be underwritten, for insuring the said ship and cargo on her said voyage from D. to L. And your orators further show unto your honors that the said J. S. sailed in the said ship, the G. M., from the island of D., on his homeward bound passage, and that the said ship with her cargo was unfortunately lost in a storm off the coast of —, on or about the — day of

&c., in consequence whereof the said underwriters became liable to pay the respective sums mentioned in the said policies of insurance. And your orators further show unto your honors that the said J. S., not being able to pay his creditors the whole of their respective debts, and such inability arising from the aforesaid loss of the said vessel, the said J. S., on or about the — day of &c., called a meeting of his creditors and proposed to assign the said policies of insurance and the moneys due thereon, and the said sum of \$ 510, due on the said policy of insurance for damage done on the said outward-bound voyage, together with a quantity of yellow saunders-wood and fustic, in lieu of their respective demands upon him, to which proposal your orators, as well as the rest of the creditors of said J. S., acceded, and it was, at the same time, agreed that the said M. L. should be the trustee for the said creditors of said J. S., whereupon, by a certain indenture bearing date &c., (*stating the deed,*) which said indenture was duly signed, sealed, and delivered by the said J. S., M. L., your orators, and the rest of the creditors of the said J. S. And your orators further show unto your honors, that since the execution of the said indenture the said defendant, M. L., has received the sum of \$10,500, on the said policy of insurance in the said indenture mentioned to have been made on the homeward bound voyage of the said ship or vessel G. M., and retains the said sum of \$10,500 in his own hands, and applies the same to his own advantage, and refuses to make any division of the said sum amongst the creditors of the said J. S. And your orators further show unto your honors, that the said defendant, M. L., has also received the sum of \$ 510, and also the sum of \$ 5,000 on the said policies in that behalf, hereinbefore mentioned to have been made and assigned to him in trust for the creditors of the said J. S. And your orators further show unto your honors that the said defendant, M. L., neglecting his said trust, suffered the said quantity of saunders-wood and fustic to remain at —, without ever attempting to sell or dispose of the same, whereby the said saunders-wood and fustic have become totally spoiled, and also a considerable sum of money, and more than the value thereof, has become due for warehouse room. And your orators submit that the said defendant M. L. ought to pay and divide between your orators and the other creditors of said J. S., who have signed the said deed of trust, the value of the said saunders-wood and fustic, and take upon himself the payment of the said warehouse room. And your orators further show that the defendant, M. L., after paying himself his said debt of \$ 5,970, ought to have divided the said several sums equally between your orators and the other creditors of said J. S., who are parties to the said indenture, for which purpose your orators, on behalf of themselves and such other the creditors of the said J. S. have frequently applied to the said M. L., and requested him to make such equal distribution as aforesaid. But the said M. L., combining and confederating with the said J. S., and with divers other persons,

&c., refuses to comply with your orators' said requests, and sometimes pretending that he has not received the said sum of \$5,000, insured on the said policy on the goods on board the said ship or vessel from D. to L. Whereas your orators charge that the said confederate has received the said sum of \$5,000 on the said policy, or if not, that he might have received the same if he had used due diligence. And your orators charge, that if in truth any obstacle arises to prevent the said M. L. receiving the said sum due on the said policy, it is entirely owing to his own misconduct in not obeying the directions given by the said J. S. to make the said insurance at the — office. Whereas your orators have lately been informed that the said M. L. made the said insurance on the said goods with private underwriters, and procured the policy to be underwritten in his own name, in which case your orators charge and humbly submit that the said defendant M. L., by such misconduct, is himself become liable to answer to your orators and other the creditors of the said J. S., for the said sum of \$5,000, due on the said policy. And at other times the said confederate M. L. pretends that the several persons, who have underwritten the said policies respectively, refuse to pay the said sum due on the said policy, because they allege that the said J. S. had not any goods on board the said ship at the time of the making the said policy, or at the time of the loss of the said ship. Whereas your orators charge that the said J. S. had goods on board the said ship to the value of \$5,000 and upwards at the time of the making of the said policy, and at the time of her loss. And at other times the said defendant M. L. will pretend that he never had the said policy for \$5,000 on the goods of the said J. S., shipped on board the G. M. from D. to L., in his possession. Whereas your orators charge that it was generally understood at the time of the execution of the indenture hereinbefore mentioned, and the said M. L. declared to the said creditors of the said J. S. that he had at that time the said policy in his possession. And your orators also charge, that if he had not a policy made in the name of the said J. S. in his possession, but that the same was made in his own name, then that he deceived your orators and the other creditors of the said J. S., and that he ought to answer the value of the said policy, the obstacle (if any) to the recovery thereof arising from the said confederate M. L. having procured the said policy to be made out in his own name, and to be executed by private underwriters, instead of the said — Insurance Company, contrary to the direction of the said confederate J. S. in that behalf. And at other times the said confederate pretends that he did make the said insurance on the said goods in the name of the said J. S., and with the — (*a different*) Insurance Company; but that they refuse to pay the same, and therefore as he has not collected the whole of the effects assigned by the indenture hereinbefore mentioned, he is not bound to divide among the creditors of the said J. S. any part of what he has collected. Whereas

your orators charge that the said confederate M. L., after paying himself the said debt and expenses hereinbefore mentioned, is bound from time to time to divide such sums of money as he has collected or shall collect equally between the creditors of the said J. S., who are parties to the said indenture, but the said confederate M. L. refuses so to do, or to permit your orators to see the said policy on the said goods, or in any manner to account for what he has collected or might have collected and received by virtue of said indenture. All which actings, &c. [*See form No. 31, p. 1902.*] And that the said defendant M. L. may be decreed by this honorable Court (after paying himself his said debt of \$5,970, and his other expenses) to account with your orators and the other creditors of the said J. S., parties to the said indenture, who shall come in and contribute to the expense of this suit, for all sum and sums of money received by him from time to time by virtue of the said indenture. And if it shall appear that the said defendant M. L., as the agent of the said J. S., has neglected to obey the directions given him by the said J. S. in regard to the making of the said insurance of \$5,000 on the goods of the said J. S., on board of the said ship the G. M., from D. to L., then that he may be decreed to be liable to your orators and the rest of the creditors of the said J. S., parties to the said indenture, for the same, and that the said defendant M. L. may be also decreed to account for the value of the quantity of saunders-wood and fustic so possessed by him as aforesaid under the said deed of trust, and that the said defendant M. L. may be decreed to pay to your orators and the rest of the creditors of the said J. S., parties to the said indenture, an equal dividend in proportion to their respective debts, of all and every the sum and sums of money which the said M. L. has received, or which might have been received by him by virtue of the said indenture, as well as of such sum or sums of money as the said M. L. is become liable to pay by reason of his said neglect of the orders of the said confederate J. S., respecting the said insurance of \$5,000 on the said goods.

And that the said M. L. may be removed from being the trustee under the said trust deed, and that some other trustee may be appointed under the direction and decree of this honorable Court. [*And for further relief, see form No. 33, p. 1904.*] May it please, &c. [*See form No. 38, p. 1906.*]

*Pray subpoena against*

M. L. & J. S.

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29. *Creditors' Bill against a corporation and its stockholders, stating the grounds on which they are liable under the Statutes of Massachusetts.*

S——, ss.

To the Honorable, the Justices of the Supreme Judicial Court, next to be holden at Boston, within and for the County of Suffolk, on the first Tuesday of April next.

Humbly complaining, show your orators, the Essex Company, a corporation duly established under the laws of this Commonwealth, having its place of business at L., in the County of E., on behalf of themselves and all the other unsatisfied creditors of the defendant corporation hereinafter named, who shall come in and contribute to the expenses of this suit, that by an act of the Legislature of this Commonwealth, approved the twenty-sixth day of March, in the year eighteen hundred and fifty-two, J. W. E., and others, with their associates, were authorized to organize a corporation by the name of the Lawrence Machine Shop, for the purpose of manufacturing machinery in said L., with a capital stock not exceeding seven hundred and fifty thousand dollars; that thereupon on the —— day of ——, under and by virtue of said act, the said Lawrence Machine Shop was duly organized, and then became and was a manufacturing corporation under the laws of this Commonwealth, having its works established at L. aforesaid.

And your orators further show, that the capital stock of said corporation was fixed and limited by said corporation at seven hundred and fifty thousand dollars; and that on the twenty-seventh day of January, in the year eighteen hundred and fifty-three, and before the whole amount of the capital stock fixed and limited by said corporation had been fully paid in, and before any certificate thereof had been made and recorded as prescribed by law, the said Lawrence Machine Shop, by G. McK., its treasurer duly authorized thereto, made and delivered to your orators three several promissory notes in writing, dated the said twenty-seventh day of January, one for the sum of fifty thousand dollars, the other two for fifteen thousand dollars each, and thereby, for value received, promised your orators to pay to them or their order the amount of said notes, to wit, eighty thousand dollars, on the fifteenth day of January, in the year eighteen hundred and fifty-eight, with interest from the fifteenth day of January, of the year eighteen hundred and fifty-three, copies of which notes, with the indorsements thereon, are set out in the copy of judgment hereto annexed.

And your orators further show, that, at the time the said Lawrence Machine Shop made and delivered said notes to your orators, and from the time of its incorporation and organization until the twenty-first day of February, in the year eighteen hundred and fifty-seven, the said Lawrence Machine Shop had not given notice annually as required by the laws of

this Commonwealth, in some newspaper printed in the county where the works of said corporation were established, to wit, the county of E., or in any newspaper printed in any other county, of the amount of all assessments voted by the corporation and actually paid in ; nor had it given notice in any newspaper of the amount of all existing debts due from said corporation.

And your orators further show, that from the time of the incorporation and organization of said Lawrence Machine Shop to the time said corporation made and delivered said notes to your orators, and for a long time thereafter, the capital stock fixed and limited by said corporation as aforesaid, had not been fully paid in ; nor has there, from the time of its organization to the present time, been any certificate of the payment of said capital stock made and recorded by said corporation, as by law provided.

And your orators further show that on, to wit, the fourth day of August, in the year eighteen hundred and sixty-two, they commenced a suit against the said Lawrence Machine Shop upon the aforesaid notes, returnable to the — Court, then next to be holden at N., within and for the said county of E., on the first Monday of September, in the year eighteen hundred and sixty-two, and duly entered said suit in said Court, and there prosecuted the same to judgment. And at said term of the said Court, on, to wit, the twenty-first day of October, in the year eighteen hundred and sixty-two, by consideration of the Justice of said — Court, judgment was rendered in said suit against said Lawrence Machine Shop in favor of your orators for the sum of thirty-seven thousand seven hundred and forty-seven dollars and sixty-two cents debt, and fifteen dollars and eighty-nine cents costs of suit ; and execution was thereupon issued by said — Court on, to wit, the twenty-fifth day of said October, against said Lawrence Machine Shop in favor of your orators for the said sum of thirty-seven thousand seven hundred and forty-seven dollars and sixty-two cents debt, and fifteen dollars and eighty-nine cents, costs of suit ; copies of which judgment, execution, and officer's return upon said execution are hereto annexed.

And your orators further show, that on, to wit, the said twenty-fifth day of October, A. D. 1862, the day of issuing said execution, they placed for collection said execution in the hands of one A. F. N., a Deputy Sheriff, qualified to collect, serve, and return said execution. And the said Deputy Sheriff on, to wit, the third day of November, A. D. 1862, made demand upon the said Lawrence Machine Shop for the payment of the amount due to your orators ; and for which judgment and execution had been rendered and issued in said suit as aforesaid.

And your orators show that the Lawrence Machine Shop did neglect, for the space of thirty days after said demand by said Deputy Sheriff, holding said execution, to exhibit to said Deputy Sheriff real or personal estate belonging to said corporation, subject to be taken on execution, suffi-

cient to satisfy said execution or any part thereof. And the said corporation has never exhibited to said Deputy Sheriff any estate, real or personal, from which he might satisfy said execution in whole or in part; and the said corporation has ever since neglected and refused to pay the same or any part thereof; and the said Deputy Sheriff duly returned said execution into the Clerk's office of said — Court, at S., in said county of E., in no part satisfied; and there is now due to your orators upon said judgment, rendered upon said notes, the said sum of thirty-seven thousand seven hundred and forty-seven dollars and sixty-two cents debt, and fifteen dollars and eighty-nine cents, costs of suit, making in all thirty-seven thousand seven hundred and sixty-three dollars and fifty-one cents, with interest from the said twenty-first day of October, A. D. 1862, the day of the date of said judgment.

And your orators further show that, at the time when said judgment debt was contracted, on, to wit, the twenty-seventh day of January, in the year eighteen hundred and fifty-three, the day of the date of said notes, and during the time from and after the said twenty-seventh day of January, A. D. 1853, and before the capital stock of said corporation, fixed and limited as aforesaid, was fully paid in, and before any certificate that said capital stock had been paid in, was made and recorded, as by law required, and from and after the said twenty-seventh day of January, A. D. 1853, and before any notice of the assessments, voted by said corporation and actually paid in, had been given, in any newspaper printed in said county of E., or printed in any other county; and from and after said twenty-seventh day of January, A. D. 1853, and before any notice of the amount of all existing debts due from said corporation had been given in any such newspaper, as by law required, and at the time when your orators commenced their suit aforesaid against the said Lawrence Machine Shop, and in which judgment aforesaid was rendered, the following named persons became, and were stockholders in the said Lawrence Machine Shop, each holding stock therein of the amount and number of shares set against their respective names: —

T. A., of L., County of M., holder of — shares, par value \$ —

E. B., of B., County of S., holder of — shares, par value \$ —

&c., &c.

Wherefore your orators, in behalf of themselves and the aforesaid other creditors of the said Lawrence Machine Shop, bring the foregoing bill against said Lawrence Machine Shop, and the aforesaid stockholders therein, and pray that the aforesaid stockholders may be ordered and decreed to pay to your orators the amount due them as aforesaid, as fixed and determined by the judgment aforesaid, with interest from the date of said judgment, and to pay such other creditors of the said corporation as may become parties to this bill such sums as may be found due to said

creditors ; and that the amount of the debt due as aforesaid to your orators from said Lawrence Machine Shop, and such as may be found due to such other creditors as may become parties hereto, may be assessed upon said stockholders as law and equity may require.

And that your orators may have such orders, decrees, and process as may be necessary to enforce the payment of such sums as may be assessed upon said stockholders, and may have such further and other relief in the premises as the nature and circumstances of the case may require and as shall seem meet unto this honorable Court ;

May it please your honors to grant unto your orators a writ of subpoena to be directed to the said Lawrence Machine Shop, and the said stockholders in this bill named, thereby commanding them, at a certain day, and under certain penalties therein expressed, personally to appear before this honorable Court, and then and there full, true, direct, and perfect answers make to all and singular the premises : and further, to stand to, perform, and abide such further orders, directions, and decrees therein as to this honorable Court shall seem meet.

The ESSEX COMPANY, *by its Treasurer.*

C. S. S.

D. S., Jun.

J. J. S.

*Solicitors and of Counsel.*

[A demurrer to this bill was overruled by the S. J. Court of Mass.]

30. *Bill by a creditor against a foreign debtor, being an insurance company, and their agent having property in his hands within the State, to compel the application, in payment of the debt, of such property, not being of a nature to be attached at law under the statutes of Massachusetts.*

The bill of complaint of D. S. of N., in the county of E., plaintiff against the Columbia Insurance Company of C., in the State of S. C., and H. E. of B., in the county of S., and State of Massachusetts, defendants.

Your orator humbly complaining shows unto your honors, that the Columbia Insurance Company of C., in the State of S. C., is a foreign Insurance Company, established by the laws of the State of S. C., and that the said company, at and prior to date of the policies hereinafter mentioned, transacted, and ever since has transacted in this Commonwealth the business of an insurance company under and by virtue of the laws of this Commonwealth in that behalf made, and that at the periods and during all the time aforesaid, H. E. of B., in the county of S., was and still is the general agent of the said company for the State of Massachusetts, appointed by said company as such, in pursuance of the statute in that behalf made.

Your orator further shows, that on the 19th day of September, A. D. 1854, the said Columbia Insurance Company by their policy of insurance, duly executed and issued to the plaintiff on said day at B. aforesaid, caused him to be insured against the perils of the sea \$ — on the outfits and \$ — on catchings on board the schooner A., at and from the coast of L., commencing the risk on the 9th day of August, 1854, at noon, on a fishing cruise, as will more fully appear by a copy of said policy of insurance hereunto annexed, marked A., which the plaintiff prays may be taken as a part of his bill.

And your orator further shows that he is informed and believes, and therefore avers, that within the period named, on the twenty-first day of August, A. D. 1854, and while said vessel was on the fishing cruise mentioned in said policy, there happened by reason of the perils insured against in said policy to the plaintiff, a general average loss on said outfits and catchings, to the amount of \$ —, and a partial loss on the same to the amount of \$ —, and that due notice and proof of said loss were made without delay by the plaintiff to said Insurance Company, namely, on the ninth day of October, A. D. 1854; — and thereupon it became and was the duty of the said Insurance Company to pay the plaintiff the amount of said loss in sixty days from said notice and proof of loss; but they have never paid the same nor any part thereof, except the sum of \$ —, although sixty days have more than elapsed. [*The bill goes on to state another policy of insurance and loss under it, and neglect by said Company to pay, and proceeds as follows.*]

And your orator further shows, that the said Columbian Insurance Company has not neglected or refused to pay the claims of your orator as aforesaid, by reason of any denial of the validity of the same, for on the contrary, the plaintiff, upon his personal knowledge, avers that said Insurance Company admits the justness and validity of said claims.

And so your orator avers, that at and before the filing of this bill of complaint, and at and before the issuing of the writ hereinafter mentioned, he was, and now is, a creditor of the said Columbia Insurance Company to a very large amount, namely, the sum of seven thousand dollars.

And your orator further shows, that heretofore, to wit, on the 20th day of January, A. D. 1855, he commenced an action at law against the said Columbian Insurance Company to recover the amounts due him on the policies of insurance aforesaid, at the next May Term of our Supreme Judicial Court for the County of E., and that on the same day he delivered the writ in said action to a proper officer for service, with directions to attach the property of said Insurance Company if any such could be found, and the said officer has returned on said writ, that after diligent search he could find no property of the said Insurance Company which was by law attachable, as will more fully appear from a copy of said writ with the re-

turn thereon hereunto annexed, and to which the plaintiff craves leave to refer as a part of his bill.

And your orator further shows, that during a long period previous to the commencement of said action at law and the filing of this bill of complaint, he has made diligent inquiries to ascertain whether the said Columbia Insurance Company had or has any property within this Commonwealth which can be come at to be attached or taken on execution, and he has never ascertained or discovered that there was any such property, but is informed and believes that there is not, and upon his information and belief, he avers, that at and before the commencement of his said suit at law, and the filing of this bill of complaint, there was no property of said Columbia Insurance Company within this Commonwealth which could be come at to be attached or taken on execution.

And your orator further shows, that he is informed and believes, and therefore avers, that there is a large amount of valuable property of the said Columbia Insurance Company now within this Commonwealth in the hands and possession of the said H. E., the general agent of the said Company as aforesaid, but which cannot be come at to be attached or taken on execution in a suit at law against the said Insurance Company; and that said property consists chiefly, if not wholly, of promissory notes which the said H. E. now holds, as the agent of the said Insurance Company, and which have been given in payment for the premiums on policies heretofore issued by the said Insurance Company within this Commonwealth, and that a very large sum of money is due to the said Company, and is collectable on said notes, and that the plaintiff is informed and believes that said sum exceeds the sum of fifty thousand dollars, but the plaintiff is unable to state more definitely the amount of said notes, or to give a fuller description of the same, because he has had no opportunity to see said notes, and has been unable to procure a list of the same, although he has requested H. E. to furnish him with one.

And your orator further shows, that the said H. E. is liable at any time to pass said notes out of his own hands and control into the control and possession of other agents and officers of said Insurance Company not residing within this Commonwealth, and beyond the reach of the process and jurisdiction of this honorable Court.

And your orator further shows, that in justice and equity, and especially by virtue of the 206th Chapter of the Acts of 1851, entitled "An Act to provide for further remedy for creditors," your orator is entitled to have the property of the Columbia Insurance Company aforesaid now in the hands of the said H. E. as aforesaid applied to the payment of the debt now due and payable from the said Insurance Company to him as aforesaid, and that he is entitled to the aid of this honorable Court as a Court of Equity in that behalf.

Wherefore the plaintiff prays that the said H. E. may be enjoined from passing the said property of the Columbia Insurance Company now in his possession, into the possession of said Insurance Company, or of any agent or officer thereof, without the order and direction of this honorable Court, and that the said H. E. may discover under oath what promissory notes and other property of the said Insurance Company may now be in his possession or under his control, and that he may be required to deliver up the same into the custody of this honorable Court, and that the amount of the debts due from the said Insurance Company to the plaintiff on said policies of insurance may be fixed and determined, and that so much of the property of said Insurance Company now in the hands of the said H. E. as may be necessary for that purpose may be applied for the payment of the debt due to the plaintiff from said Insurance Company as aforesaid, and to grant the plaintiff such other and further relief as to justice and equity may appertain.

To this end may it please your honors to grant unto your orator not only your writ of injunction to be directed to the said H. E., and said Company restraining him from putting away said promissory notes and other property, and directing him to place the same in the custody of such person or persons as your honors may appoint, but also, &c. [*Prayer for subpoena against said H. E. and the Columbia Insurance Company.*]

(*Jurat*)

D. S.

[*Silloway v. Columbia Ins. Co. 8 Gray, 199.*]

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## SECTION IX.

### *Bill respecting the Excessive Use of a Right.*

31. *Bill for an account and injunction, where a trespass had been committed, by exceeding a limited right to enter and take stone from a quarry, such trespass being a destruction of the inheritance.*

To &c.

Your orator A. B., of &c. That your orator now is, and for several years past has been, seized in fee simple of and in certain lands and hereditaments, situate at C., in the county of D.; and in the said estate, at a certain place called E., there is, and for a considerable time past has been, a stone quarry, whence stone, for various purposes, of considerable value, has from time to time been obtained; and that L. M., of &c., (the defendant hereinafter named,) is also seized in fee simple, of and in certain messuages, lands, and hereditaments, and among others, of and in a certain farm called N. Farm, now in his own occupation, adjoining and contiguous

to your orator's said estate at C. aforesaid, and also to the said stone quarry ; and the said L. M., as owner or occupier of the said farm, called N. Farm, was and is entitled to enter into the said quarry at E. aforesaid, and take thence stone for building and other purposes, for that part of his estate called N. Farm aforesaid, but for no other part of his said estate ; but the said L. M., notwithstanding his right was so limited as aforesaid, has taken a considerable quantity of stone from the said quarry, for the purpose of using it on other parts of the said estate. And your orator further sheweth unto your honors, that your orator has frequently of late, by himself and otherwise, applied to the said L. M., and requested him to account for so much stone as has been so taken and used or intended to be used, on any part of his said estate, other than N. Farm aforesaid, and to make to your orator a reasonable satisfaction for the same, and to desist in future from taking any stone from the said quarry, except for N. Farm aforesaid, without your orator's permission, which your orator hoped the said L. M. would have done. BUT NOW SO IT IS, may it please your honors, the said L. M., &c., refuses to comply with such requests, and threatens and intends to get, take, and carry away great quantities of stone from the said quarry, to be used upon other parts of his said estate as well as N. Farm aforesaid ; and he pretends that he is entitled so to do, and that his said privilege extends to the whole of his said estate. Whereas your orator charges, that such privilege is expressly limited and confined to N. Farm aforesaid, and that in case the said L. M. shall persist in his said intention, he will occasion irreparable damage and injury to your orator and to his said estate. And if the said L. M. shall pretend that the said privilege extends to any other part of his said estate than N. Farm aforesaid, then that he may discover and set forth in what manner in particular he makes out the same. And that the said L. M. may make a full and true disclosure and discovery of and concerning the several matters aforesaid ; and that he may also discover and set forth what quantity of stone has been taken from the said quarry, and used and applied by or for him, otherwise than in and upon N. Farm aforesaid, and when the same and every part thereof was taken, and how used, applied, or disposed of, together with the value thereof, and of every part thereof. And that an account may be taken, by and under the decree and direction of this honorable Court, of all the stone taken from the said quarry by the said L. M., and used, or intended to be used, or disposed of by him otherwise than in and upon N. Farm aforesaid, and that the value thereof may be ascertained, and the said L. M. decreed to pay the same to your orator. And that in the mean time the said L. M. and his agents and workmen, may be restrained, by the order and injunction of this honorable Court, from getting, taking, and carrying away any stone from the said quarry, except for building and other purposes in and upon N. Farm aforesaid. [*General relief.*] May it please, &c.

## SECTION X.

*Bills relating to Partnership Matters.*

32. *Bill by one partner against another in the business of carpenters and builders, for an account of partnership transactions, the defendant having entered into various speculations without the consent of the plaintiff, and charged the loss of such speculations to the firm. The defendant having also hindered the plaintiff from attending at the place of business, the plaintiff took other premises and carried on business in the partnership name. The bill also prays for an injunction to restrain the defendant from receiving the partnership moneys, and for a receiver, and also for directions as to the future management of the business.*

Humbly complaining sheweth unto your honors your orator H. B. of &c., carpenter and builder, that in or about the month of &c., your orator agreed with W. P., of &c., carpenter and builder, the defendant hereinafter named, to become a partner with him in his said trade and business, and thereupon a certain indenture of two parts bearing date on the — day of &c., was made and executed by and between your orator and the said W. P., which among other things therein contained was as follows, viz. [*stating the deed.*] And your orator further sheweth that the said partnership trade and business was accordingly entered upon and carried on by the said W. P. and your orator pursuant to the provisions of the said indenture, and the same hath ever since continued and now continues; and your orator hath from time to time in all things duly conformed to the stipulations and agreements in the said indenture contained. And your orator further sheweth that the said W. P. has since the commencement of the said partnership been in the habit of receiving all large sums of money, and of drawing all checks and bills of exchange on the partnership account; but the said W. P. has not duly and regularly entered all such transactions on the partnership books of account, but has entered therein only a small part of such transactions, and has kept your orator in ignorance thereto; and the said W. P. has drawn many bills and given many acceptances and notes in the name of the partnership firm, not in respect of the partnership concerns, but for his own private purposes. And your orator further sheweth that, notwithstanding the provision in the said partnership articles that the partnership accounts should be duly stated and made up on the — day of — in each year, yet the said W. P. has not yet stated and made up the partnership accounts to the — day of — although he has been repeatedly applied to for that purpose. And your orator further sheweth that after the formation of the said partnership, the said W. P., without consulting

or communicating with your orator, took in his own name certain ground and premises in —, and also in —, and the said W. P. built thereon, and the carpenters' work to such respective buildings was done by the partnership workmen and from the partnership stock, but all other workmen were employed thereon by the said W. P. without any communication with your orator. And your orator further sheweth that such several speculations having proved unprofitable, and a considerable loss having been incurred thereby, the said W. P. has lately pretended that all such speculations were entered into by him on partnership account, and that your orator is to bear his proportion of the loss. And your orator further sheweth that in or about &c., the said W. P. took a lease of premises in — in his own name, and the said W. P. proceeded to build a house thereon, and represented to your orator that he was building it for a Mr. R., and the carpenters' work was by the desire of the said W. P. at first entered in the partnership books to Mr. R.'s account; but the said W. P. afterwards informed your orator that he was to build the house on his own account, and the carpenters' work was from thence considered as the private debt of the said W. P. And your orator further sheweth that the expense of building the said house, including the carpenters' work, amounted to \$—, and that the said W. P. afterwards sold the said house for \$— only, and then insisted that it was a speculation on the partnership account, and that your orator should bear his proportion of the loss. And your orator further sheweth that the said W. P., in the beginning of the year —, applied to the father of your orator for a loan of money, alleging the trade required more, and that your orator had not a sufficient capital in the trade. And your orator further sheweth that your orator's father upon that occasion referred to your orator, and being informed of the reasons which your orator had to complain of the conduct of the said W. P., refused to advance any further sum of money, and thereupon differences and disputes arising between the said W. P. and your orator, the said W. P. proposed terms for the dissolution of the partnership to which your orator acceded, but the said W. P. afterwards changed his terms, and your orator not being able to come to any agreement in that behalf with the said W. P., gave notice to the said W. P. that all treaty for a dissolution was at an end. And your orator further sheweth that your orator afterwards continued to give his attention to the partnership business as usual, although he was upon many occasions abused and insulted by the said W. P. And your orator further sheweth that on the — day of — your orator was at the partnership counting-house when a message came from Mr. — requesting Messrs. P. and B. to send a man to his house to do some carpentering jobs, and your orator thereupon directed one of their men to go accordingly; but the said W. P. overhearing what passed desired their foreman P. not to let the man go, and your orator then inquiring of the said

W. P. what he meant by such conduct, the said W. P. answered that he did not choose the man should go, and that your orator had better go about his business and not come there, and that none of the men should do anything he ordered them to do, and the said W. P. added some terms of opprobrium and abuse of your orator; and the said W. P. then ordered C., their clerk, to keep the books himself, and to lock up the safe in order that your orator might not have access to them; and your orator having a pass key to the lock of the safe door, and to other locks on the partnership premises, the said W. P. caused the locks to be changed. And your orator further sheweth that being compelled by such conduct on the part of the said W. P. to absent himself from the partnership business, your orator forthwith took other premises in — in the name of the partnership firm for the purpose of carrying on business there on the joint account of the said W. P. and himself pursuant to the aforesaid articles of partnership; but your orator at the same time considering it to be desirable that a dissolution of the partnership should be effected, if it could be done upon fair and reasonable terms, the solicitors of your orator, at his request, on or about &c., wrote and sent a letter to the said W. P. in the words and figures or to the purport and effect following; that is to say,— Sir, “In consequence” &c.

And your orator further sheweth that the said W. P. hath taken no notice of the said letter, nor hath since in any manner communicated with your orator, and your orator hath from thence continued to carry on business in the partnership name and on the partnership account in the said new premises in —, but hath at all times been and is now willing and desirous to attend to the partnership business if requested or permitted so to do by the said W. P.

And your orator humbly insists that the said W. P. ought to come to an account of the partnership dealings and transactions from the commencement thereof, and that the said W. P. ought to be restrained by the injunction of this honorable Court from receiving and collecting the partnership debts and moneys due or to accrue due; and that some proper person ought to be appointed by this honorable Court to receive and collect the same; and that proper directions ought to be given by this honorable Court for the conduct and management of the said partnership business in future for the joint and equal benefit of the said W. P. and your orator. TO THE END.  
[See form No. 32, p. 1902.]

And that the said defendant may answer the premises and that an account may be taken of all and every the said copartnership dealings and transactions from the time of the commencement thereof; and also an account of the moneys received and paid by your orator and the said defendant respectively in regard thereto, your orator being ready and willing, and hereby offering to account for the partnership dealings and transactions

which have been carried on by your orator in the premises in ——— afore-said ; and that said defendant may be decreed to pay to your orator what upon the taking of the said accounts shall appear to be due to him. And that in the mean time the said defendant W. P. may be restrained by the order and injunction of this honorable Court from collecting or receiving any partnership debts or other moneys, and that some proper person may be appointed to collect and receive the same ; and that proper directions may be given for the conduct and management of the said partnership business in future, for the joint and equal benefit of your orator and the said W. P. [*And for further relief, see form No. 33, p. 1904.*]

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*33. Bill for a dissolution of a partnership between auctioneers, and for an injunction to restrain one of the defendants from collecting debts.*

To &c.

Humbly complaining sheweth unto your honors, the plaintiff P. C., of &c., that in or about the month of ———, the plaintiff entered into an agreement with C. B., of &c., and C. F., of &c., the defendants hereinafter named, to form a partnership with them in the business of auctioneers and appraisers, which agreement was reduced into writing, and signed by the plaintiff and the said defendants, and was of the following purport and effect, viz.: (*stating the same*) as in and by the said agreement, reference being thereto had, will appear. And the plaintiff further sheweth that the said copartnership business was entered upon, and hath ever since continued to be carried on by the plaintiff and the said defendants, in pursuance of and under the aforesaid agreement, no articles or other instrument having ever been prepared and executed between them. And the plaintiff further sheweth that having much reason to be dissatisfied with the conduct of the said C. B., and being desirous, therefore, to dissolve the said partnership, the plaintiff, on or about ———, caused a notice in writing, signed by the plaintiff, to be delivered to the said C. B. and C. F., as follows, viz.: "In conformity," &c., &c., as in and by such written notice, now in the custody or power of the said defendants, or one of them, when produced, will appear. And the plaintiff further sheweth that the said C. B. has from time to time, since the commencement of the said partnership, applied to his own use from the receipts and profits of the said business, very large sums of money, greatly exceeding the proportion thereof to which he was entitled, and in order to conceal the same, the said C. B., who has always had the management of the said copartnership books, has never once balanced the said books. And the plaintiff further sheweth that, having in the beginning of the year ——— discovered that the said C. B. was greatly indebted to the said copartnership, by reason of his applica-

tion of the partnership moneys to his own use, the plaintiff, in order to form some check upon the conduct of the said C. B., requested that he would pay all copartnership moneys which he received in to his bankers, and would draw for such sums as he had occasion for; but the said C. B. has wholly disregarded such request, and has continued to apply the partnership moneys received by him, to his own use, without paying the same in to the bankers, and has also taken to his own use moneys received by the clerks, and has by such means greatly increased his debt to the partnership, without affording to the plaintiff and the said C. F. any adequate means of ascertaining the true state of his accounts. And the plaintiff further sheweth that he has, by himself and his agents, from time to time applied to the said C. B., and has requested him to come to a full and fair account in respect of the said copartnership transactions, with which just and reasonable requests the plaintiff well hoped that the said defendant would have complied, as in justice and equity he ought to have done. BUT NOW SO IT IS, &c., the said defendant C. B. absolutely refuses so to do, and he at times pretends that he has not received and applied to his own use more than his due proportion of the partnership profits; whereas the plaintiff charges the contrary thereof to be truth, and so it would appear if the said C. B. would set forth a full and true account of all and every his receipts and payments in respect of the said partnership transactions, and of the gains and profits which have been made in each year since the commencement of the said partnership. And the plaintiff charges that the said C. B. has in fact received the sum of \$ ——— and upwards beyond his own proportion of the partnership profits, and that he is nevertheless proceeding to collect in the partnership debts and moneys, whereby the balance due from him will be increased to the great loss and injury of the plaintiff and the said C. F. And the plaintiff charges that the said C. B. ought therefore to be restrained by the order and injunction of this honorable Court from collecting and receiving any of the said partnership debts and moneys. And the plaintiff charges that the said C. F. refuses to join the plaintiff in this suit. All which actings, &c.

And that the said defendants may answer the premises; and that the said copartnership may be declared void, and that an account may be taken of all and every the said partnership's dealings and transactions from the time of the commencement thereof, and also an account of the moneys received and paid by the plaintiff and the said defendants respectively in regard thereto; and that the said defendants may be decreed to pay to the plaintiff what, if anything, shall, upon the taking of the said accounts, appear to be due to him, the plaintiff being ready and willing, and hereby offering to pay to the defendants or either of them what, if anything, shall, upon the taking of the said accounts, appear to be due to them or either of them from the plaintiff; and that in the mean time the said defendant C.

B. may be restrained, by the order and injunction of this honorable Court, from collecting or receiving the partnership debts or other moneys. [*And for further relief, &c.*] May it please, &c.

*Pray subpoena against C. F., and*

*Subpoena and injunction against C. B.*

34. *Prayer in a bill seeking an account of partnership dealings, receiver and injunction. [Modern English Form.]*

1. That an account may be taken by and under the decree and direction of this honorable Court, of all the said partnership dealings and transactions between the plaintiff and the defendant, and that what shall appear thereon to be due from the defendant may be decreed to be paid by him.

2. That a proper person may be appointed to receive, collect, and get in all the outstanding debts and moneys due to or on account of the said partnership business or concern, and also to take possession of all the effects and property of or belonging to the said partnership.

3. That the defendant may be ordered to deliver up to such person all the effects and property of or belonging to the said partnership in his possession or power, and also all books of account, accounts, receipts, vouchers and papers of or belonging to the said partnership; and that the defendant may be restrained, by the order and injunction of this honorable Court, from demanding, receiving, or obtaining possession of any debts, moneys, or property due or belonging to the said partnership; and also from in any manner intermeddling with the books, papers, bills, or accounts of the said partnership; and that the said effects and property of or belonging to the said partnership may be sold and converted into money by and under the direction of this honorable Court.

4. That out of the share of the defendant in the produce thereof, what shall be found due to the plaintiff in respect of the moneys of the partnership so improperly applied by the defendant as aforesaid, may be made good to the plaintiff.

5. That all such further directions as may be necessary may be given.<sup>1</sup>

35. *Prayer of a bill filed after a dissolution of partnership between iron-mongers, the defendants having agreed to exonerate the plaintiffs from*

<sup>1</sup> See form of order for the sale of partnership property, and for a receiver, in *Wilson v. Greenwood*, 1 Swanst. 483. As to the joint and separate assets, in case of a bankruptcy or death of one of two partners, see *Butchart v. Dresser*, 4 De G., M. & G. 542; *Ridgway v. Clare*, 19 Beav. 111. And as to appointing a receiver at the instance of the solvent partner against the assignees of bankrupt partner. *Freeland v. Stansfield*, 2 Sm. & G. 479; 1 Jan. N. S. 8.

*the payment of the debts,—the plaintiffs pray that an account may be taken of the debts due from the firm, and remaining unpaid, that the defendants may be declared answerable for the amount thereof, and that the plaintiffs may be declared to have a lien for the same on the partnership stock and premises, and if necessary for a sale thereof, in satisfaction of such debts; also, for an injunction to restrain the defendants from selling the partnership stock, &c., and that a covenant entered into by the plaintiffs, restraining them from carrying on the trade within forty miles may be reformed, according to the agreement of the parties.*

And that an account may be taken of all and every the debts and demands which were due from the plaintiffs and the said P. J. B. in their partnership firm of —, or in respect thereof at the time of executing the said indenture of the — day of —, and which have not been paid and satisfied by the said P. J. B. on the said other defendants, and that the said several defendants may be declared answerable for the amount of what shall be found due on such account. And that it may also be declared that the plaintiffs have a lien to the amount of what shall be found due on such account upon the partnership stock, premises, debts, and effects, which were assigned by the plaintiffs to the said P. J. B. in consideration of his engagement to exonerate the plaintiffs from the payment of such debts; and that, if necessary, the said partnership stock, premises, and effects may be sold and applied in satisfaction of such debts under the decree of this honorable Court, and that all proper directions may be given in that behalf. And that the defendants may in the mean time be restrained, by the injunction of this honorable Court, from selling, assigning, or disposing of the said partnership stock, premises, and effects, and that the said covenant in the said indenture of the — day of —, whereby the plaintiffs are restrained from engaging in or carrying on any part or branch of making or manufacturing iron under any modification whatsoever, or any articles or utensils made of iron, within forty statute miles of —, may be reformed according to the intent and agreement of the partners respecting the same as aforesaid. [*And for further relief.*]

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36. *Bill by surviving partner, against the administrator, widow, and heirs of the deceased partner, claiming certain real estate which had been purchased with funds of the partnership, as partnership property.*

To the Judges of the Circuit Court of the United States for the District of Massachusetts.

M. K., of M., in the State of New Hampshire, and a citizen of said

New Hampshire, stonecutter, brings this his bill against T. G., of C., in the county of M. and Commonwealth of Massachusetts, merchant, the administrator of the goods and estate of O. H., late of said C., stonecutter, and a citizen of Massachusetts, deceased; N. H., of said C., widow; H. O. H., and S. S. H., both minors, under the age of twenty-one years, residing with their mother, said N. H., at said C.; J. F., of M., in said county of M., gentleman; F. P., of B., in the county of S., and Commonwealth aforesaid, clerk; and E. H. D., of said C., merchant; all citizens of the said Commonwealth of Massachusetts.

And thereupon your orator complains and says, that on or about the 22d day of January, A. D. 1834, one O. H., then of said C., but now deceased, and your orator, entered into copartnership together, under the firm of H. & K., as stonecutters, for the purpose of carrying on business as dealers and workers in hammered and other stone, for buildings and other purposes, on joint account, and upon an equal division of profits, and they then contributed the sum of five hundred dollars each, to form a capital stock to start with, and they continued to carry on business together, as such general partners, at said C., from said date up to the 22d day of December, A. D. 1841, when said partnership was dissolved by the death of said O. H., as hereinafter stated;—that in the course of their partnership transactions and dealings, previously to the 1st day of January, A. D. 1839, your orator and said O. H., as such partners, became possessed of and owned divers copartnership property and assets, consisting of stone, tools, notes, accounts, five eighth parts of a certain sloop or vessel, called the *Almira*, of C., a certain parcel of land situate on the easterly side of C. square, in said C., bounded, &c., [*description and boundaries*,] and a certain parcel of land situate in C. street, in the city of B., bounded, &c., [*description and boundaries*,] and your orator further shows, that both said parcels of land were purchased by your orator and said O. H., with their copartnership funds, and on account and for the use of the copartnership, and the same were originally and always intended by your orator and said O. H. to be held, enjoyed, and managed as part of their copartnership stock; and in the year 1837, your orator and said O. H., having then a large quantity of building granite stone on hand belonging to the firm, concluded, upon consultation together, as the most advantageous way of using said stone, for the benefit of the concern, to erect a granite stone building, for a store and offices, upon said land in C. square, on the copartnership account, and out of the copartnership funds, and for the benefit of the concern; and they accordingly, and in pursuance of said determination, did thereupon build said building on said land, out of and with their copartnership funds and property, intending the same to constitute a part of their joint copartnership stock and property, and have ever since held and enjoyed, and considered, the same as part of their joint copartnership stock and property.

And your orator further shows, that on the first day of January, A. D. 1839, your orator and said O. H., upon taking an account of their copartnership stock and property, as it then was, being the original stock and all accumulations thereon, estimated and set down the same as follows, to wit: The said land and stone building on the easterly side of C. square, at six thousand dollars; the said land in C. street, at two thousand dollars; the said sloop *Almira*, (or their interest therein,) at one thousand dollars; stock and tools at their stone yard, at twelve hundred dollars; cash on hand, including notes and accounts due them, at sixteen hundred dollars; two certain notes of one C. E., at two hundred and seventy-two dollars;—in all, the sum of twelve thousand and seventy-two dollars; and the same real and personal estate was then declared, in writing, by said O. H. and your orator, to be the copartnership stock and property of the concern, of which said O. H. and your orator were equal owners, share and share alike.

And your orator further shows, that the said O. H. had, from the first, and continued until at or about the time of his death, to have the sole charge and management of all the financial affairs of the concern, receiving all the money, and making all the payments, keeping the books and accounts, and having charge of the papers of the firm, and the general care of all its property and concerns, except as to the stone and tools in the stone yard, and the care and management of the work there, and the execution of the jobs and contracts there, which had been undertaken by the firm, to which department your orator gave his entire attention, from the commencement of the partnership until its dissolution; and on said 1st day of January, 1839, upon the occasion of the taking said account of their partnership property and affairs, and after declaring what their partnership stock consisted of, as above stated, and upon settling, each with the other, as to the moneys drawn out by each respectively, for their own use, up to said date, said O. H. undertook and agreed, in writing, under his hand and seal, with your orator, that he, said O. H., would, from his own means, and without impairing your orator's interest in said copartnership property above specified, pay and discharge all debts and demands, of every nature, then due and owing from said partnership, when the same became payable, and would save your orator harmless from all such debts and demands, excepting that any contracts for work and materials, or any other thing connected with the business of the firm, made in the year 1838, and to be performed after said first day of January, 1839, should be paid or discharged by the copartnership.

And your orator further shows, that from and after said first day of January, 1839, your orator and said O. H. continued their joint business as before, with their said capital stock, composed of and consisting in said real and personal estate above specified, and on or about the second day of February, 1840, being in want of the sum of \$1,500, for their copartner-

ship uses and purposes, they borrowed the same sum upon their copartnership account, from said J. F., upon a mortgage of their said land and building in C. square, made to said J. F., as guardian of one N. F., a minor, to secure the joint and several note of your orator and said O. H., of that date, payable in three years, with interest semi-annually, and all the money so borrowed was received by said O. H., on account of the firm, in the same manner as all other funds arising from their copartnership business; and the whole semi-annual interest, which became payable during said O. H.'s life, on said mortgage note, has been paid by him out of the copartnership funds, and charged in the company's books, as a debt of the concern. And your orator has been informed and believes, and therefore states the fact to be, that said J. F. has transferred and assigned said note and mortgage to said F. P., who now holds the same; but when said assignment was made, or for what consideration, or whether the same was absolute or conditional, your orator is not informed, and cannot now state.

And your orator further shows, that said O. H., as the managing partner of said firm of H. & K., between the said first day of January, 1839, and the 22d day of December, 1841, received and had on the said firm's account, and to their use, divers copartnership moneys, to the amount of \$48,400, and upwards, as near as your orator has been able to ascertain the same, and during the same time paid out, in payment of the copartnership debts and liabilities and for copartnership purposes, the sum of \$37,361.09, and no more, as near as your orator has been able to ascertain the same; but whether any part of said last-named sum, and if any, how much, was paid out by said O. H. to discharge debts due before January 1st, 1839, which said O. H. was bound to discharge out of his own means, your orator is not now informed, and cannot now state with certainty, except as to two small debts, amounting together to \$65, which your orator has been obliged to pay since his decease. That during the same time, your orator received and drew out of the concern, for his own use, the sum of \$1,422.98, and no more, the same being handed to him, at sundry times, by said O. H., and charged to your orator in the books, except the sum of \$266, which does not appear to be charged; and that the residue of said copartnership moneys, upwards of \$9,600, so received by said O. H., remains due from and unaccounted for by him to the concern.

And your orator further shows, that the said O. H. died at said C., on the 22d day of December, 1841, intestate, leaving a widow, said N. H., and only two children, and no issue of any deceased child surviving him, viz. said H. O. H. and said S. S. H., both minors, of tender years; that said T. G. was afterwards duly appointed the administrator of said O. H., deceased, and duly accepted, and took upon himself that trust.

And your orator further shows, that upon the death of said O. H., and the dissolution of the partnership between him and your orator consequent

thereon, the joint debts, due from said firm to others, amounted to upwards of the sum of \$7,400, as near as your orator has yet been able to ascertain, exclusive of the claim of your orator upon the firm;—that the copartnership assets at the same time consisted of certain stone and tools, then in the stone-yard or wharf occupied by them at C., estimated and valued at \$1,300; five eighth parts of the sloop Almira, estimated at \$937<sup>50</sup>/<sub>100</sub>; divers accounts and notes; and said real estate in C. square and in C. street; and said balance of copartnership moneys in the hands of said O. H., as above stated;—that the above estimates and valuations were made upon and affixed to said stone and tools, and said five eighth parts of said sloop Almira, respectively, by said T. G., as administrator of said O. H., soon after his appointment, and your orator;—and the same were to be and have been disposed of and converted into cash by your orator at the above rates, with the concurrence of said T. G.;—that your orator, as surviving partner, proceeded without delay, and with all fidelity, to realize the cash from said stone and tools, and said interest in said sloop, and to collect said notes and accounts, so far as he could, and has realized from said sources the sum of \$5,480<sup>84</sup>/<sub>100</sub>, and no more;—and at the same time your orator has paid, and discharged, and liquidated, since the death of said O. H., copartnership debts of said late firm to the amount of \$5,729<sup>14</sup>/<sub>100</sub>, among which were some debts, amounting together to \$65, that should have been paid by said O. H. exclusively, according to his said undertaking of January 1st, 1839.

And your orator further shows, that there are still divers debts due from, and demands against, said late copartnership, which he has not been able to discharge, out of said partnership property or otherwise; and there is also a large balance justly due and payable to him, out of said partnership property, on a just settlement of the copartnership concerns, for which said copartnership property is and should be holden to him, before the administrator, or heirs, or widow of said O. H., in justice and equity ought to have any portion thereof; but inasmuch as the title to one undivided half of said copartnership assets in real estate is now, by the strict rules of the common law and the form of the conveyances of the said two parcels of land to your orator and said O. H., in the said two children of said H., who are his heirs at law, and the same is also at law subject to his said widow's right of dower therein, your orator cannot, without the aid of a Court of Equity, to wind up the partnership concerns and distribute the assets, as to justice and equity shall appertain, make said partnership property, now existing in the shape of real estate, available for the payment of the said partnership debts now outstanding, nor the payment of your orator's own just claims thereon. Neither has your orator received anything from the private estate of said O. H. since his decease; nor can he collect anything therefrom, as the same is supposed, by his said administrator (as your orator is informed and believes) to be insolvent.

And your orator further shows, that said O. H., in or about the month of April, 1839, without any concert with your orator, and without his previous knowledge, and (as your orator supposed when he learnt the fact) on his, said H.'s own private account, purchased a lot of land in said C., situate &c., [*description and boundaries,*] and took the conveyance thereof in his, said O. H.'s, own name ; and afterwards erected a dwelling-house thereon, which he occupied himself, down to the time of his death. But instead of paying for the same out of his own private means, your orator has since discovered that said O. H., wrongfully, and without the knowledge of your orator, and in fraud of your orator, applied the copartnership funds of the firm to the whole payment for said land, and the whole cost of building of said house, concealing the same from your orator. That your orator discovered said misappropriation and misuse of the partnership funds, by said O. H., during his last sickness, and shortly before his death ; and your orator has also been informed and believes, and accordingly states the fact to be, that said O. H., shortly before his death, stated and declared, that said dwelling-house and premises belonged in truth as much to your orator as to himself ; that it was built out of the firm's money, or words to that effect ;—and your orator, upon taking the papers and documents belonging to the firm into his possession, after said O. H.'s death, found the deed of said land, on which said dwelling-house was built, filed with the deeds of said land in C. square and in C. street, and the other papers and documents of the firm, in the desk where they had been placed and were kept by said O. H.

And your orator further shows, that he has been informed, and believes, and accordingly states, that said E. H. D. claims to hold a mortgage upon said dwelling-house and premises near B. street, made to his father, E. D., deceased, whose administrator he is, by said O. H., to secure the payment of a private debt of said O. H.'s, to said E. D., of one thousand dollars ; but when said mortgage was made, and for what consideration, and any other particulars respecting the same, and whether said E. D. had, at the time he took said mortgage, any notice or knowledge that said land was paid for, and said house built from the copartnership funds of said H. & K., so wrongfully used and misapplied by said O. H., in fraud of your orator, your orator does not know, and cannot state with certainty ; but prays that said E. H. D. may, in his answer, make full discovery and disclosure thereof, and concerning the same.

And your orator well hoped that no dispute or difficulty would have occurred respecting the settlement of the said copartnership concerns, but that said real estate on C. square, and said land in C. street, as well as said dwelling-house and land near B. street, might all have been sold and converted into cash, and the proceeds taken by your orator, as surviving partner of said firm, as part of the copartnership property, so that your orator could have paid all the copartnership debts, and have liquidated and ad-

justed and wound up all the copartnership concerns, without invoking the aid of this honorable Court. But, by the form of the conveyances to said late firm of H. & K., of the said land on C. square and said land in C. street, the legal title to one undivided half thereof was, during said O. H.'s life, vested in him in fee at law, and upon his death the same descended, subject to his widow's dower therein, to his said two children ; although, in equity and in truth, the said O. H., during his lifetime, held the said undivided half of said lands, as trustee for the firm, and the same descended, subject to said trust, to his heirs ; and the legal title to the said dwelling-house and land near B. street was wholly vested in said O. H. during his lifetime, and the same, upon his death, descended at law, subject to his widow's dower, to his said heirs, although the same in equity and good conscience belonged to the said firm, and said O. H. was in truth but the mere trustee thereof for the firm. And the said H. O. H. and S. S. H., the children and heirs-at-law of said O. H., deceased, are both minors of tender years, and incapable of conveying the title to said real estate to your orator, as surviving partner of said firm, for the purpose of enabling him to wind up, adjust, liquidate, and settle the copartnership concerns, if they were disposed so to do.

And your orator further shows, that said T. G., the administrator of said O. H., claims, or has claimed, that the one undivided half of the said estate on C. square, and of said land in C. street, and the whole of said dwelling-house and land near B. street in C., are the private estate of said O. H., and threatens, or has threatened, to sell the same for the payment of the private debts of said O. H., to the exclusion of the paramount rights of your orator and the creditors of the firm, to have the same treated and applied as partnership assets. And said N. H. claims that, as the widow of said O. H., deceased, she is entitled to dower in all the said real estate whereof her husband was seized at law during his life ; and threatens to take measures to have the same set out to her. And your orator has reason to apprehend that said T. G., as such administrator, will proceed to apply to the Probate Court for the county of M., for license to sell said real estate for the payment of said O. H.'s private debts, and will apply the proceeds of such sales to that purpose ; and that said N. H. will proceed to seek to have dower set out to her in said estates ; and that said real property, so in justice and equity the copartnership property and assets of said late firm of H. & K., will be diverted from your orator and the creditors of said firm.

To the end, therefore, that said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make, to such of the several in-

terrogatories hereinafter numbered and set forth, as by the note hereinafter written they are respectively required to answer, that is to say :

1. Whether &c.
2. Whether &c.
3. Whether &c.

And so on, 45 interrogatories.

And that said land and building in C. square, and said land in C. street, and also said land and dwelling-house near B. street, may be adjudged and decreed to be partnership property and assets of the said late firm of H. & K., and that the same may be ordered to be sold, under the direction of this honorable Court, for the purpose of winding up the concern, and that a receiver of all the copartnership assets and property now unadministered, by your orator, may be appointed, and that proper and just accounts may be taken between the parties, touching the matters in question, and that said O. H.'s estate may be charged with a fair rent for said dwelling-house, during the time it was in his occupation, and for such further time, if any, as may seem meet to your honors, and that all the affairs and concerns of said late firm of H. & K. may be wound up, adjusted, and closed, under the direction of this honorable Court, and after payment of all the debts of the concern, and the partnership balance which may be found due to your orator out of the assets, that the surplus may be divided between your orator and the administrator or heirs of said O. H., according to their respective rights therein, and as to justice and equity may appertain ; and that, in the mean time, said administrator, widow, and heirs of said O. H. may be restrained and enjoined from proceeding to take any measures to sell said real property or interest therein, or to have any dower set out therein to the said widow, or from any proceeding touching said real estate, or any of it, adverse to the interests and claims of your orator, until the relative rights and interests therein, of your orator and the said defendants, may be settled and determined ; and that your orator may have such further and other relief in the premises as the nature of his case shall require, and as to your honors shall seem meet.

May it please your honors to grant unto your orator not only a writ of injunction, firmly restraining and enjoining said T. G., the administrator, and said H. O. H. and S. S. H., the heirs, and said N. H., the widow of said O. H., deceased, from taking any measures to sell said real estate, or any part thereof, or any interest therein, or to have any dower set out therein, or in any part thereof, until the relative rights and interests of your orator and said defendants in said real estate, may be settled and determined ; but also &c. [*Pray subpoena directed to said T. G., N. H., H. O. H., S. S. H., J. F., F. P., and E. H. D.*]

M. K.

G. & E., Solicitors.

The defendants T. G., N. H., H. O. H., and S. S. H. are required to answer all the interrogatories numbered 1 to 42, both inclusive.

The defendant N. H. is required also to answer the interrogatories numbered respectively 43 and 45.

The defendant T. G. is required also to answer the interrogatory numbered 44.

The defendant J. F. is required to answer the interrogatories numbered respectively 18 and 19.

The defendant F. P. is required to answer the interrogatory numbered 19.

The defendant E. H. D. is required to answer the interrogatory numbered 40.

[Kelley v. Greenleaf, 3 Story C. C. 93.]<sup>1</sup>

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## SECTION XI.

### *Relating to an Agent.*

37. *Bill to recover of an agent what he ought to have obtained, but has failed to receive, in the course of his agency.*

To the Judges of the Circuit Court of the United States for the District of Massachusetts :

W. D., the younger, of the city, county, and State of New York, merchant, and a citizen of said State, brings this, his bill, against N. W., the younger, and A. S., merchants and copartners doing business in B., in the State of Massachusetts, under the firm of N. W., Junior, & Company, and citizens of the State of Massachusetts.

And thereupon your orator complains and says, that, in the month of January, A. D. 1856, he was the owner of a certain ship or vessel called the Mastiff, then lying in the port of B., bound on a voyage to S. F., in the State of California, and that being desirous to procure a cargo of goods and merchandise to be carried to said S. F., in said vessel on freight, he applied to the said W. & S., who were engaged in that line of business, to obtain a cargo for said vessel on freight, and, as a compensation for their services in so doing, agreed to pay them a commission of five per centum on the amount of the freight and prime of such goods and merchandise as they should procure to be shipped on board of the said ship, in consideration of which they agreed to act as his agents in the premises, and to make use

<sup>1</sup> See Dyer v. Clark, 5 Metcalf, 562.

of their knowledge, skill, and ability to procure a full cargo for said vessel on freight, — and that accordingly the lading and procurement of freight was intrusted to them, and in the said month of January, and the ensuing months of February and March, they did procure a cargo for said vessel, and in the month of March she set sail and departed on her voyage for said S. F.

That on or about the seventeenth of said March, they, said W. & S., sent to your orator a freight list, or statement of the amount of merchandise laden on board of the said vessel, and of the rates of freight thereof, and of the sums of money to be earned and paid on the carriage and delivery thereof at said port of S. F. (which said freight list your orator prays leave to file in Court as a part of this bill); by which it appears that all the merchandise laden on board of the said ship was shipped at specific rates of freight therein set down, and that the total amount of freight, including primage, was the sum of twenty thousand and one dollars and twenty cents, upon which sum the said W. & S. claimed of your orator, and he paid to them, a commission of five per centum, amounting to the sum of one thousand and five dollars and six cents, together with other charges for advertising, and so forth, as by their bill herewith also filed, in the full belief and relying on the assurance of the said W. & S., made by sending him the said freight list and otherwise, that the merchandise therein mentioned had been actually laden on board of the said vessel, to be carried and delivered at and for the rates of freight therein specified.

That the said ship was consigned to certain persons doing business at said S. F., under the firm of C. & D., who, upon the arrival of said vessel in the month of —, 1856, attended to the unlading and discharge of the cargo, the collection of the freight and the remittance thereof to your orator. That upon such discharge and delivery, it appeared that fifty-seven  $\frac{1}{2}$  tons of pig iron, which in the said freight list were specified as shipped at the rate of ten dollars per ton, and the freight of which was therein stated to amount to five hundred and seventy-seven  $\frac{1}{8}$  dollars, and one hundred and thirty-three nests tubs, two hundred nests tubs, and seventy-five dozen pails, which in said freight list were specified as shipped at and for the freight or compensation of five hundred and ten dollars, were not shipped at such rates of freight, but that the rate of freight specified therefor in the bills of lading thereof (which were not signed by the master of said ship, but by the said W. & S., who assumed to act as his agents in that behalf without his knowledge or consent) was “*one half net profits over costs and charges*”; that the said iron, tubs, and pails, as your orator is informed and alleges, could not be sold at any profit, and that the said C. & D. did not collect, and your orator has not received, any freight or compensation for the carriage and delivery thereof at said S. F.

That, upon receiving information from the said C. & D. of the fact that

said iron, tubs, and pails were shipped on half profits instead of the rates of freight stated in said freight list, your orator immediately advised the said W. & S. that he held them responsible for the amount of freight at which they had represented that the same were shipped, and upon which they had charged and been paid their full commission, and requested payment thereof, which they refused to make.

That the commission, agency, and trust, for which your orator retained said W. & S., was to procure a cargo for said vessel to be carried and delivered on payment of freight in money at specified rates, and not upon half profits; that the said W. & S. represented to your orator that they had obtained and shipped a cargo, upon the delivery of which your orator would be entitled to receive the sums of money as freight therefor specified in the said freight list; that said W. & S. demanded of your orator a commission on the amount thereof, as so shipped, and that your orator paid them said commission, in the full belief and relying upon their assurance, contained in said freight list, that the various articles therein mentioned were shipped at the rates of freight therein specified, and that upon the safe delivery thereof your orator would be entitled to receive the same in money.

That the said iron, tubs, and pails were safely carried to S. F. and delivered to the consignees thereof, and that upon such delivery your orator had earned and was entitled to be paid for such service the rates of freight and sums of money specified in the said freight list, the same being the usual and current rates of freight, upon the amounts of which, as such, the said W. & S. charged their commissions as aforesaid; — that by reason of their undertaking to carry and deliver the same upon half profits instead of on freight, your orator has lost the sums of money to which he should have been entitled and to which the said W. & S. represented that he would be entitled on the delivery thereof, and has not received and is not entitled to claim, by reason of their said doings, any compensation from the owners or consignees of the said goods and merchandise for the cost and expense of their transportation and delivery; — and that by reason of the premises, and of the representation made that the said goods and merchandise were shipped at the rates of freight specified in the said freight list, the said W. & S. are bound to make good the loss your orator has suffered by their said doings, and to pay to him the sums of money which he would have received if the said goods and merchandise had been shipped at the rates specified in said freight list, and your orator has repeatedly requested them so to do.

But now, so it is, may it please your honor, that the said W. & S. absolutely refuse to comply with such request.

To the end, therefore, that they, the said W. & S., may be decreed to pay to your orator the said sums of five hundred and seventy-seven  $\text{R}^{\text{d}}$

dollars, and five hundred and ten dollars, and such losses, damages, and interest as your orator has suffered by reason of the premises, and that your orator may have such other relief as the nature of his case may require, and that the said W. & S. may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several corporal oaths, and to the best of their knowledge and belief, make answer to all and singular the premises.

May it please your honor to grant unto your orator a writ of subpoena, directed to the said N. W., the younger, and A. S., commanding them at a suitable time and place to appear before your honor to make answer to the premises, and to abide by and perform such order and decree as to your honor shall seem meet.

F. C. L.,  
Solicitor.

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## SECTION XII.

*Bills to cancel or to rectify and reform Agreements, Bonds, and other Instruments.*

38. *Bill by lessee to have an agreement delivered up to be cancelled, by which he gave up the remainder of his lease, contrary to his intention, he not being able to read or write ; praying also to have the original lease confirmed,—also for an account and repayment of the land-tax paid by the plaintiff, and for an injunction to restrain the defendant from proceeding in an action of ejectment commenced by him.*

Humbly complaining, sheweth unto your honors, the plaintiff, W. A., of &c., that on or about —, a certain indenture of lease was made and duly executed between E. L., then of &c. &c. &c., whereby the said E. L. did, &c., [*stating the lease to the plaintiff,*] as in and by the said indenture, to which the plaintiff craves leave to refer, when produced to this honorable Court will appear. And the plaintiff further sheweth, that he entered upon and possessed the said farm and lands under and by virtue of the said lease ; and that the said E. L. departed this life in or about &c., and that after his death, J. H., of &c., the defendant hereinafter named, became, by purchase or otherwise, seized of or entitled to the possession of the said farm and lands, subject to the said lease. And the plaintiff further sheweth that no notice was ever given to the plaintiff to determine or make void the said lease at the end of — years from the commencement of the said term of — years thereby demised, pursuant to the proviso therein contained or otherwise, but upon the expiration of such — years, the said J. H. proposed to the plaintiff to enter into a new

agreement as to the said farm and lands, giving the plaintiff to understand that the interest of the plaintiff therein was determined. And the said J. H., upon that occasion, as he had frequently done before, expressed great friendship for the plaintiff, and declared that it was his wish and intention that the plaintiff should continue in possession of his said farm as long as he lived. And the plaintiff further sheweth, that the plaintiff can neither write nor read, and that the plaintiff fully believing that his interest in the said lease was determined, and that the said defendant, who is a man of fortune, was dealing fairly by the plaintiff, and was not intending to take any advantage of him, the plaintiff consented to enter into the new agreement proposed by the said J. H.; and thereupon the said defendant caused such agreement to be reduced into writing by one M. B., and the plaintiff set his mark thereto, but the same was not read once or in any manner explained to him, and such agreement was in the words and figures or to the purport and effect following (that is to say): [*To remain one year and pay the land-tax, which he was not to pay by his lease*] as in and by said agreement, &c. And the plaintiff further sheweth, that, confiding in the said J. H.'s professions of friendship for the plaintiff, and in his aforesaid declarations that it was his wish that the plaintiff should continue on his said farm as long as the plaintiff lived, the plaintiff proceeded to expend considerable sums of money in erecting new buildings upon the said farm and lands, and in other improvements thereof. And the plaintiff further sheweth that in or about &c., the said J. H. informed the plaintiff that he must either pay an advanced rent of \$——, or deliver up possession of the said premises. And the plaintiff having refused to comply with such unexpected and unjust demand, the said J. H., on or about &c., caused the plaintiff to be served with a notice to quit the said farm on the —— day of ——. And the plaintiff further sheweth that after he had received the said notice, the plaintiff having complained to one of his relations of the great hardship of being obliged to quit his farm after he had expended so much money in improving it, in consequence of the said defendant's assurances that the plaintiff should continue on it during his life, and having, in the course of such conversation, mentioned his lease from the said E. L., his said relation desired to see that lease, and upon perusing the same read to the plaintiff the proviso therein contained, whereby it appeared that the said lease was not to determine at the end of the first —— years, without —— months' previous notice. And the plaintiff further sheweth that he has since, by himself and his agents, repeatedly applied to the said J. H. and requested him to deliver up the said agreement of the —— day of —— to be cancelled, and to confirm the said indenture of lease of the —— day of ——, and to return to the plaintiff the land-tax, which he has paid in respect of the said farm since the making of the said agreement, and which he was thereby bound to pay, although he was not liable to pay

it by the said indenture of lease; with which just and reasonable requests the plaintiff well hoped that the said J. H. would have complied, as in justice and equity he ought to have done. BUT NOW SO IT IS, &c. And the said J. H. has commenced an action of — in the — Court, &c., &c., to obtain possession of the said premises. And the said defendant sometimes pretends that previously to the making of said agreement of the — day of —, the said defendant had fully explained to the plaintiff that the plaintiff was entitled to hold the said premises under the said indenture of lease, until the end of the term of — years therein mentioned, and that the plaintiff was desirous to surrender and determine the said lease. Whereas the plaintiff expressly charges the contrary thereof to be the truth, and that the said defendant never did in any manner explain to the plaintiff, or give him to understand that he was entitled to hold the said farm until the end of the said term of — years. And the defendant well knew at the time of making the said agreement of the — day of —, that the plaintiff would not have entered into the same if he had been aware of his rights under the said indenture of lease, and the said defendant for that reason concealed from the plaintiff that he had such rights. And the plaintiff charges that at the time of making the said agreement the plaintiff had not the advice or assistance of any person whatsoever, but acted therein according to the suggestions of the said defendant, supposing he meant to be kind toward him, and would deal fairly by him. All which actings, &c.

And that the defendant may answer the premises; and that the said agreement, bearing date the — day of —, may be decreed to be delivered up to the plaintiff to be cancelled; and that the defendant may confirm the said indenture of lease of the — day of —. And that an account may be taken of what the plaintiff has paid for land-tax of the said farm since the making of the said agreement, and that the defendant may be decreed to repay the same to the plaintiff; and that in the mean time the defendant may be restrained by the order and injunction of this honorable Court, from proceeding in the said action of —, and from commencing or prosecuting any other proceedings at law against the plaintiff for recovering possession of the said premises. [*And for further relief, &c.*] May it please, &c.

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39. *Bill against the executors of the obligor to have a bond delivered up to be cancelled, which had been given to secure the consideration money for the purchase of their testator's supposed interest in certain farms, for the residue of a term of years, it afterwards appearing that he was only tenant from year to year, and plaintiffs having received notice to quit,—praying also for an injunction to restrain the defendants from proceeding in an action commenced by them on the bond.*

Humbly complaining, show unto your honors, your orators, I. L., of &c.,

farmer, and I. L., junior, of &c., the son of your orator I. L. That T. C., late of &c., but now deceased, and who was a coach-master and also a farmer, did, in or about the beginning of the year —, dispose of part of his business as coach-master, and also his stage horses, to your orator I. L., junior, for the sum of \$——. And your orators further show that the said T. C. then occupied — farms at &c., which were the property of F. S., and the said T. C. represented to your said orator that he was entitled to the said — farms for the residue of a term of — years, commencing as to the meadow land on —, and as to the rest of the premises on —, at the annual rent of \$——. And the said T. C. proposed to sell his said interest in the said — farms to your said orator for the residue of the said term of — years, at the price of \$——. And your orators show that your said orator I. L., junior, thereupon agreed with the said T. C. to purchase his said interest in the said — farms, for the sum of \$——, and your said orator not being prepared to pay the money, it was further agreed between them that your orator I. L. should join your orator I. L., junior, in a bond for securing the said sum of \$—— to the said T. C. And your orators further show that Mr. H., the attorney of the said T. C., having, by his directions, prepared a common money bond from your orators to him the said T. C., for the payment of the said sum of \$—— and interest, your orator I. L. objected thereto, and desired to have the transaction stated in the bond, to which the said T. C. answered that it mattered nothing between them, but your said orator not being satisfied with such answer, desired the said Mr. H. to make a minute in writing of the consideration for which the bond was really given as aforesaid, and the said Mr. H. accordingly made such minute in writing, with the consent of the said T. C., and then read the same over to your orators and the said T. C., who, upon hearing it, observed that it was perfectly right, and your orators then executed said bond which bears date in or about the month of —.

And your orators further show, that upon the execution of the said bond your orators entered into the occupation of the said — farms, and have ever since occupied the same; but the said T. C. never made or executed any actual assignment of his said pretended interest therein to your orators or either of them. And your orators further show that the said T. C., some time in the month of —, departed this life, having first duly made and published his last will and testament in writing, and thereof appointed E. T., of &c., and A. G., of &c., (the defendants hereinafter named,) executors, who thereupon duly proved the same in the proper Court, and undertook the executorship thereof, and thereby became his legal personal representatives. And your orators further show that in the month of — last, the said E. T., as agent or steward of the said F. S., served your orators with a notice to quit said — farms at the end of

the then current year, insisting, as the fact appears to be, that the said T. C. was only tenant from year to year of the said — farms, and had no power to dispose of the same to your orators for the residue of the said term of — years. And your orators further show that the said bond for \$ — and interest having, therefore, been given by your orators to the said T. C. without consideration, and by reason of the false representations of the said T. C. that he had such interest in the said — farms as aforesaid, your orators have, by themselves and their agents, repeatedly applied to the said E. T. and A. G., and have requested them to deliver up to your said orators the aforesaid bond to be cancelled. And your orators well hoped that the said E. T. and A. G. would have complied with such your orators' reasonable requests, as in justice and equity they ought to have done. BUT NOW SO IT IS, &c., —, they refuse so to do. And although the said defendants well know that the said bond was given by your orators as a consideration for the supposed interest of the said T. C. in the said — farms, for the residue of the said term of — years, yet defendants have lately commenced an action at law in Court upon the said bond, and have caused your orators to be held to bail thereon, and the said defendants threaten and intend to proceed to judgment and execution on the said bond, unless they are restrained therefrom by the injunction of this honorable Court. TO THE END, therefore, &c. [*Prayer for the bond to be delivered up, and an injunction to restrain proceedings at law.*]

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40. *Prayer of a bill to set aside a lease which had been granted upon the surrender of a former lease, and for an account of earth and gravel dug up beyond the quantity allowed under the old lease; plaintiff offering to grant a lease, to continue for such term as was granted by the old lease, and to confirm any underleases granted by the defendant; praying also TO HAVE AN AGREEMENT AND BOND DELIVERED UP, and for costs against the defendants; — praying also IN THE ALTERNATIVE, THAT IF THE NEW LEASE OUGHT NOT TO BE SET ASIDE, THEN THE SAME MAY BE RECTIFIED, and for an injunction to restrain the defendants from digging gravel or committing waste, or granting underleases.*

And that the said lease so executed by the said L. M., as aforesaid, may be set aside as having been obtained by fraud and imposition, and that the said C. G. may be decreed to deliver up the same to be cancelled,<sup>1</sup> and that he may be decreed to account with the plaintiffs for all the earth and gravel dug up and taken by him from the said premises, beyond the quan-

<sup>1</sup> See *Martin v. Graves*, 5 Allen, 601.

tity which he was entitled to dig under the old lease, and for the profits made by him by such earth and gravel, plaintiff hereby offering to deliver up the counterpart of the said lease to the said C. G., and also offering to grant a new lease to the said C. G., for such term as would be still subsisting in the old lease, if the same had not been surrendered, upon the same terms as were contained in such old lease with respect to such part of the said term, and to allow to the said C. G., in account, the surplus rent which has been paid by him under the new lease, beyond the rent which was reserved by the old lease, and also, so far as the Court shall think fit to direct, to confirm all the leases, underleases, and assignments made by the said C. G. at any time before plaintiff's bill of complaint in this cause was filed, and to make all reasonable allowances to the said C. G. for moneys laid out upon the said premises, and generally to submit to such terms as the Court shall be pleased to impose. And that the said A. L. may be decreed to deliver up the said agreement, of the — day of —, to the plaintiffs, and to deliver up the said bond executed by the said C. G. to him; and that the said A. L., as well as the said C. G., may be decreed to be answerable for and to pay all the costs of this suit, and of setting aside the present lease and granting the new one, OR, if this Court shall be of opinion that the said lease ought not to be set aside, then that the same may be *reformed and rectified* by omitting the covenant contained in the said lease with respect to the apportionment of rent, and by introducing a covenant for reserving to the owner of the reversion of the property comprised in the said lease, the right of having all underleases and assignments of the said property prepared by his own solicitors. And that the said C. G. may be restrained by injunction of this Court from digging clay and making bricks upon the said land, and from digging and removing gravel from the same; and from committing any other waste or spoil in or about the said demised premises, and from granting, or making and contracting to grant and make, any leases, underleases, or assignments of any part of the said demised premises. [*And for further relief.*]

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41. *Statements in a bill to cancel a deed obtained by fraud, the property having afterwards been mortgaged to third persons without notice.*

Bill alleges that plaintiff was aged and infirm, unable to read and write, and unaccustomed to the transaction of business, that the defendant, his brother-in-law, obtained from him authority to collect his rents and take charge of his property; and some time afterwards, with intention to defraud the plaintiff, plied him with intoxicating liquors, and brought him, while thus intoxicated, a document to sign, fraudulently representing it to be a power to collect rents and to manage his property; that this document

was not read to the plaintiff, nor was he informed of its true contents, and that he signed it with his mark, relying entirely upon said representation; that he is now informed that it was a deed of conveyance of his whole estate to the defendant, for the nominal consideration of one hundred dollars; that the consideration was entirely nominal, that nothing was ever paid or agreed to be paid by the defendant for the land, and that the defendant never agreed to buy, and the plaintiff never agreed to sell or convey the land to him, or had any conversation or thought about such sale; that the defendant now assumed to own the entire estate conveyed in said deed, and had incumbered it with two mortgages (described in the bill), entirely without the consent, knowledge, or acquiescence of the plaintiff, and was about to convey away the whole estate, as the plaintiff feared and had reason to believe.

The bill prayed that the defendant might be restrained from further mortgaging, incumbering, or conveying the land, or exercising any act of ownership over it; that the deed to the defendant might be given up and cancelled; and for further relief.

[Dodd v. Cook, 11 Gray, 495.<sup>1</sup>]

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42. *To annul a contract for fraud.*

SUPREME JUDICIAL COURT.

In Equity.

JOHN LEE,	.	.	Plaintiff,
JAMES STYLES	}	.	Defendants.
and			
HENRY JONES			

*Bill of complaint.*

To the Honorable Justices of the Supreme Judicial Court, &c.

Humbly complaining, sheweth unto your honors John Lee, of &c., in the county of —, Esq., the above-named plaintiff, as follows:—

1. That on the — day of —, 1865, the plaintiff was the owner of a farm situate in the town of —, county of —. [*Describe the farm.*]

2. That the plaintiff being then old, infirm, and blind, and by reason thereof incapacitated from attending properly to business, the defendants on that day fraudulently taking advantage of the plaintiff's said incapacity, procured him to sign a certain writing, without paying him any considera-

<sup>1</sup> The Court held in this case that the defendant would be liable both for the land and for the amount of the two mortgages with which he had incumbered the estate. For form of bill to declare void a levy, see Troup v. Wood, 4 John. Ch. 228; Briggs v. French, 2 Sumner, 261.

tion therefor, and which writing they falsely and fraudulently represented to be a mere matter of form.

3. That the plaintiff has since, and on the —— day of ——, 1865, applied to the defendants for said writing, or for information as to the contents thereof; but the defendants refused to allow him to see said writing or to give him any information concerning the same. That, as the plaintiff is informed and believes, the said writing is under seal and is a deed of said premises, and conveys the same, or some interest therein, to the defendants, and that they intend to use the same for their own benefit, and to the prejudice of the plaintiff.

Whereupon the plaintiff prays that this Court will declare the same to be void, and decree that defendants produce said writing and deliver it up to be cancelled, and for his costs of this suit. [*Further relief.*]

[*Prayer for subpoena.*]

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*43. Pretences and charges as to a release of all claims set up by the defendant.*

And at times the said confederate B. pretends that the said C., in her lifetime, executed some deed or other instrument in writing, whereby she acquitted, released, and discharged him, the said B., from the payment of all sums and sum of money due from him in respect of the matters aforesaid, and from all claims and demands whatsoever in respect thereof, or to some such or the like purport or effect. Whereas the plaintiff charges the contrary thereof to be true, and moreover that the said C. never did make any such release or discharge to him the said B., as hereinbefore pretended; or if she did give or execute the same (but which plaintiff does not admit), she was grossly deceived and imposed upon in relation thereto, and that the same was obtained from her, or she was prevailed upon to execute the same, by some unfair means or practices used in that behalf by the said B. And as evidence thereof, plaintiff charges that the said C. never gave any directions whatsoever to any person to prepare the same, nor was the same drawn or prepared by any person employed by or on behalf of the said C., but that such pretended release or instrument, if any such there were, was drawn and prepared by or under the directions or from the instructions of the said B., and by some person employed by him. And the plaintiff moreover charges that no draft of the said pretended release or instrument was perused by the said C. or any person on her behalf at any time previously to the execution thereof, nor was the same sent to or laid before any person for such purpose. And the plaintiff further charges that the said pretended release or instrument was produced and brought to the said C., ready drawn and prepared for execution, and she never perused or read over the same, nor was the same read over to her, or however not

truly in her hearing, nor were the contents thereof made known or fully explained to her at any time previously to or at the time of the execution thereof, but the said pretended release or instrument was stated or represented to her to be of some purport, tenor, or effect different from what the same really was, and that she would not have signed or executed the same in case she had known or been fully apprised of the real purport, tenor, and contents thereof. And the plaintiff further charges that a considerable sum of money was due and owing from the said B. to the estate of the said C., plaintiff's father, and also to the said C., or one of them, on the accounts aforesaid, at the time of the execution of the said pretended release or instrument, notwithstanding which the said B. did not pay all or any part of such money, nor any sum of money whatsoever, as the consideration for her executing the said pretended release or instrument, nor did the said C. receive any other consideration whatsoever for the same; but nevertheless the said B. refuses to discover or disclose, as plaintiff humbly insists he ought to do, by whom and from whose orders and instructions, and by whose directions the said pretended release was drawn or prepared, and where, in whose presence, and when the same was executed by the said C., and the names and places of abode of the subscribing witnesses thereto. And under the circumstances aforesaid, plaintiff charges and insists that the said pretended release or instrument (if any such was executed) ought to be delivered up to be cancelled as having been fraudulently and unfairly obtained from the said C.; but nevertheless the said confederate insists upon the contrary, and claims the full benefit of the said pretended release or instrument, and threatens and intends, in case the plaintiff shall proceed at law against him touching the matters aforesaid, to set up the pretended release or instrument in bar thereto, or to any action to be brought in that behalf, &c.

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44. *Allegations in a bill to reform a policy of insurance in conformity with a previously concluded agreement for insurance.*<sup>1</sup>

And thereupon your orator complains and says, that on the —— day of &c., he was the sole owner of a ship or vessel of the value of \$ ——, called the ——, then lying at Q., in the province of ——, and bound on a voyage from said Q. to a port of discharge in said N. K., on board which said ship there had been and was then laden a cargo of merchandise, the property of various persons other than your orator, and which said merchandise your orator had agreed should be conveyed in said ship, from said Q. to said port of discharge, for a certain amount of hire or freight to be paid him by said parties respectively therefor, amounting in the whole to the sum of \$ ——. And your orator being desirous to procure said vessel

<sup>1</sup> 2 Curtis C. C. 277.

and said freight to be insured for said voyage, at and from said Q. to said port of discharge, namely, the said ship for the sum of \$——, valued at \$——, and said freight for the sum of \$——, valued at \$——, against the perils of the seas and other risks usually contained in marine policies of insurance, on property of such description, did, in writing by letter, bearing date, &c., request his agent, one J. E. O., of said Q., to procure the same to be insured on account of your orator, and to have the policies of insurance thereon in the name of your orator, a copy of which letter, marked (A), your orator hereto annexes and prays that the same may be taken as a part of this his bill of complaint.

And your orator further sheweth, that said J. E. O., afterwards on the —— day of the same ——, in compliance with the request of your orator, did, through one H. M., of ——, broker, request one A. McL., of the city of ——, and State of ——, insurance broker, to procure said insurance upon said ship and said freight, to be made and effected at some proper and solvent insurance company in said ——, or in ——, in said State of ——, and did cause to be transmitted to said A. McL., insurance broker as aforesaid, a copy of your orator's said letter, bearing date the said ——; and thereupon the said A. McL. being unable to procure said insurance to be made and effected for a reasonable premium in said ——, did, in writing, authorize and request one D. R. M., of said ——, commission merchant, to cause said insurance to be made and effected by some proper insurance company in said ——, which said written request and authority so given by said A. McL. to said D. R. M., was and is contained in two certain letters written by the said A. McL. to said D. R. M., one of which letters bears date &c., and the other of said letters bears date &c.; and your orator hereto annexes copies of both said letters marked (B. and C.), and prays that the same may be taken as parts of this his bill of complaint.

And your orator further shows, that in said letter of said A. McL., bearing date the &c., by accident and mistake, the said D. R. M. was directed to cause said ship to be insured for the sum of \$——, to be valued at the sum of \$——, and said freight to be insured at the sum of \$——, and to be valued at the sum of \$——; and in and by said letter of said A. McL., bearing date the said ——, said mistake was in part corrected, and said D. R. M. was directed to insure said ship for the sum of \$——, and to insure said freight for the sum of \$——; but by accident and mistake, the sum for which said ship and said freight were to be valued thereon was wholly omitted.

And your orator further shows, that the said D. R. M., after receiving said letters on the ——, did apply to the said Commercial Mutual Marine Insurance Company to make insurance upon said ship and freight for your orators, according to the order and request of the said A. McL., and

did then and there exhibit both said letters of said A. McL. to said Insurance Company, with the intent to inform said Insurance Company as well of the relation of said A. McL. as agent of the owners of the said ship, as to enable them to determine the character of the risk to be insured, and said Insurance Company did afterwards read and examine said letters, and on the same day did agree with the said D. R. M., acting as the agent of your orator, to insure the said ship on the voyage aforesaid, at and from said Q., for the sum of \$ —, to be valued at the sum of \$ —, and to insure the said freight of said ship on said voyage for the sum of \$ —, to be valued at the sum of \$ —, and to receive as premium therefor the sum of \$ —.

And your honor further shows, that, thereafterwards, on the &c. —, the said Insurance Company, with the intent and design to carry into effect said agreement, did cause to be made a writing or policy of insurance, signed by the president and secretary, bearing date &c., a copy of which is hereto annexed, marked (D), which your orator prays may be taken as part of this his bill of complaint, and did deliver said policy to said D. R. M., the agent of your orator, as aforesaid, and did receive from said D. R. M., the agent of your orator, said premium of \$ —, which sum was thereafterwards by your orator repaid to said D. R. M.

And your orator further shows that, although, when said Insurance Company had so agreed to insure said ship and freight for the amounts aforesaid, it was well known to said Insurance Company that said A. McL. was merely the agent of the owner of said ship and of the person entitled to, and solely interested in, said freight; and that he, said A. McL., had no insurable or other interest whatever in either said ship or said freight, and that said A. McL. was, by profession and pursuit, a mere insurance broker, and that he was acting as the agent of the person who owned said ship and who was solely interested in said freight, and yet by accident and mistake said insurance on said ship and said freight was, by the terms of said policy &c., declared to be on account of said A. McL., and without adding thereto the word agent or any other term indicating that he, the said A. McL., was insured as said agent of the party owning said ship and interested in said freight, and without the usual clause commonly inserted in such policies, that said insurance was effected for whom it might concern.

And your orator further shows, that said Insurance Company knew, and was distinctly informed by said D. R. M. by said letter of said A. McL. to said D. R. M., bearing date &c., and submitted to and read by them as aforesaid, that said A. McL. was the mere agent of and broker for the owner of said ship, and had no interest whatever in said ship or freight, except so far as he would be entitled to the usual commission of a broker for procuring said insurance; and that said Insurance

Company did agree, consent, and understand at the time said agreement to insure said ship and freight was made with said D. R. M., and before said policy so made to carry said agreement into effect was written and signed, that said insurance was to be made for the benefit and on account of the owner of said ship; and that said A. McL. was not the owner of said ship nor interested therein or in said freight, and that by mere inadvertence, accident, and mistake in writing said policy of insurance, it was omitted to be inserted in said policy, that said insurance was made on account of said A. McL. as agent and for whom it might concern.

And your orator further shows unto your honors, that said policy was received by the said D. R. M., and transmitted to the said J. E. O., the agent of your orator, and by him kept and retained in ignorance, that by the terms and legal effect thereof no other interest was insured thereby save that of the said A. McL., and in the full understanding as well by said A. McL., said D. R. M., and said J. E. O., that the interest of your orator in said ship and freight, to the extent of the sums named in said policy, was thereby insured and protected, in accordance with your orator's directions contained in his said letter to said J. E. O., bearing date the said &c.

And your orator further shows &c. [*Here state the loss of, &c.*]

And your orator submits to your honors, that, by reason of the premises, he is justly and equitably entitled to have said mistake so made in drawing said policy of insurance corrected, and said policy reformed by inserting therein that said insurance was made an account of A. McL. as agent, or for whom it may concern; and that the sums so insured by said company on said ship and said freight be paid to him accordingly.

And your orator further shows unto your honors, that previously to this suit being commenced, on the — day of —, and since, he applied to, and requested, and caused applications to be made to said Insurance Company, to act towards your orator in such a way as is equitable and just, and to reform said policy as aforesaid, and to adjust and pay to him the sums so insured by them on said ship and said freight, and so lost to your orator as aforesaid by reason of the perils insured against in said policy, and exhibited to said Insurance Company the usual and proper proofs of said agency of said A. McL. and of said loss, and of his sole ownership of said ship and sole interest in said freight at the time of said agreement so made with the agent of your orator by said Insurance Company to insure the same as aforesaid, and your orator well hoped that said Insurance Company would have yielded to his said applications and paid to him the sums so insured by them and lost by him as aforesaid.

[*Oliver v. The Mut. Comm. Mar. Ina. Co. 2 Curtis C. C. 277.*]

45. *Charges and prayer in bill to rectify settlement and remove trustees.*  
[*Modern English Form.*]

The truth of the matters aforesaid would appear, if the defendants R. W. and T. W. would set forth, as they ought to do, when and where and how and from whom and in whose presence the said T. W. received the instructions for the said settlement and the said new bonds executed as aforesaid, and whether or not in writing, and what has become thereof and of the drafts and copies of the said settlement and bonds, and of all letters and notes which passed about the same or the preparation thereof, and whether the said T. W. made any and what entries in any and what book or books or bill of costs about taking such instructions, or the attendances for the same, and what is become thereof.

That the said settlement ought to be rectified and altered according to the intention of the parties thereto, and that the said former securities for the said loan to the said ——— ought to be restored to the plaintiffs, and ought to be taken as still subsisting &c.

That the defendants ——— and ——— ought to be removed from being trustees, and new ones appointed by the said M. A. D.

*Prayer.*

1. That it may be declared, that the aforesaid exchange or substitution of the said new securities for the said several sums of \$ ——— and \$ ——— bank annuities, and the dividends thereof, was a fraud upon the plaintiffs.

2. That it may be declared, that the said defendants ——— and ——— respectively are liable for the said several sums, to the same extent and in the same manner as if such exchange or substitution of securities had not taken place, and that they may be decreed forthwith to pay or make good such sums respectively, or such of them and such parts thereof as they were respectively liable for before such exchange or substitution of securities took place, and that the said defendants ——— and ——— may be decreed forthwith to pay or replace the said sum of \$ ———.

3. That, if necessary or proper, the said new securities may be delivered up to be cancelled.

4. That the said ——— and ——— may be removed from being trustees of the said settlement, and that the plaintiff M. A. D. may be at liberty to appoint new trustees thereof.

5. That it may be declared, that the said settlement is improperly framed in the particulars hereinbefore mentioned, and that the same may be corrected accordingly; and that the said trust moneys, when so paid or replaced, may be duly invested upon the trusts of the said settlement, when so corrected as aforesaid.

6. That the said J. W. may be declared to be responsible for what, if anything, may be lost by the aforesaid exchange or substitution of securities.

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46. *Bill to have a conveyance reformed.*

(New Hampshire.)

TO THE SUPREME JUDICIAL COURT.

ROCKINGHAM, ss.

T. K., of &c., complains against T. G., of &c., and N. G., his wife, and says that on the — day of —, 1856, the said defendants, T. G. and N. G., were negotiating with one M. for the purchase of a certain farm in H., bounded &c.; that M. agreed to sell said farm for \$1,200, and it was agreed that the plaintiff should furnish \$1,000 of the purchase-money; that M. should convey the farm to the said N. G.; that she should give the plaintiff a note for said sum of \$1,000, and a mortgage of said land, to secure the note, and that the said M., T. G. and his wife, and K., the plaintiff, all met and transacted the business in that way, and that said acts were all parts of one and the same transaction; that said K., the plaintiff, is now the owner of said note and mortgage, that said note and interest thereon is now wholly due to said K., the plaintiff, and unpaid; that at the time of said transactions said N. G. was a married woman, and the wife of said T. G.; that the plaintiff was ignorant at the time, and not aware but the security thus taken was good and valid, and that he inquired of the magistrate who made the writings, and was informed that the security thus taken would be good, and that he supposed that, having paid a part of the purchase-money for the farm, he could have an interest in or security upon the same until his debt was paid; that said N. G. has been requested to pay the money, or to surrender possession of the land, but declines to do either, upon the ground that the note and mortgage are void, because she was, at the time of their execution, a married woman; that said N. G. knew, at the time of said conveyances, that said note and mortgage were void, and that she gave them in that way for the purpose and with the intent to defraud the plaintiff; and that said T. G., well knowing all the premises, was present and assisted his said wife in consummating said fraud on the plaintiff.

Wherefore the plaintiff prays that it may be ordered and decreed that unless the defendants, or one of them, pay said sum of \$1,000 and interest thereon, to the plaintiff, within a reasonable time, they and each of them be foreclosed from the right to redeem said premises, or that the interest of said plaintiff in said land may be set out to him, or that his deed may be

reformed, so as to give effect to the intention of the parties, and for such other relief as may be just.

T. K.

J. B., *Solicitor*.

*Decree on the above.*

It is, therefore, ordered and decreed that said T. G. and N. G. execute and deliver to the plaintiff, within twenty days, a joint quit claim mortgage deed of the premises described in the plaintiff's bill, to secure nine hundred and ten dollars, as of the — day of —, upon the presentation to them of such a deed by the plaintiff; and that unless the said sum of nine hundred and ten dollars, with legal interest thereon from said — day of —, be paid to the plaintiff within sixty days, a writ of possession, in common form, as upon mortgage, shall issue in favor of the plaintiff.

[*Kennard v. George*, 44 N. H. 440.]

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47. *Bill to reform a conveyance by correcting a mistake in a boundary.*

(*Title and Address.*)

Humbly complaining, sheweth unto your honors, the plaintiff,

1. That on the — day of —, 186—, the defendant executed and delivered to the plaintiff, under his hand and seal, a deed, of which the following is a copy, [*give a copy, containing, for example, the following description of the premises conveyed.* All that certain lot, &c., beginning at a point, &c., running thereon easterly along A. street — feet, thence southerly along B. street — feet, thence westerly and parallel to C. street — feet, thence southerly and parallel to D. street — feet, to the place of beginning.]

2. That the description therein given of the premises intended to be conveyed was erroneous, and in fact does not describe any premises whatever; that the word "southerly," as last used in said description, was inserted by mistake of the parties<sup>1</sup> to said deed [*or otherwise, or if fraud is relied upon, the circumstances of it should be specifically stated*], instead of the word "northerly," which should have been used instead thereof; and that in order to make said deed pass any premises whatever to the plaintiff, and to make it conform to the actual intention of the parties,<sup>2</sup> it is necessary that the said description should be rectified and reformed by substituting the word "northerly" for the word "southerly," where the latter word is

<sup>1</sup> The mistake must be made out according to the understanding of both parties. *Sawyer v. Hovey*, 3 Allen, 331; *Andrews v. Essex Ins. Co.* 3 Mason, 10; *Green v. Morris*, 1 Beasley (N. J.) 170; *Canedy v. Marcy*, 13 Gray, 373. But see the sensible limitations upon this doctrine in *Brown v. Lamphear*, 35 Vermont, 252.

<sup>2</sup> *Ibid.*

last used therein [*or say, so as to read as follows, and insert description in full as corrected*].

3. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.

[*Prayer that the deed may be reformed, &c.*]

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### SECTION XIII.

#### *Bills to restrain the infringement of copyrights.*

48. *A bill to restrain a publication of a "Life of Washington," containing — pages, of which — pages were copied from Sparks's "Life and Writings of Washington," — pages being official letters and documents, and — pages being private letters of Washington, originally published by Mr. S.*

To the Judges of the Circuit Court of the United States, for the District of Massachusetts :

The bill of complaint of C. F., T. G. W., L. T., and J. S., all of C., in the county of M., in said district, against B. M., N. C., G. P. L., and T. H. W., and C. W. U.

Respectfully show your orators C. F., T. G. W., and L. T., printers and publishers and copartners, doing business under the name and style of F., W. & T., and J. S., gentleman, all of C., in the county of M., in said district of Massachusetts, and all being citizens of the United States, that the said J. S. is, and heretofore at the time of the infringement hereinafterwards mentioned was, proprietor of the copyright of a work of which the said J. S. is the author and compiler, entitled, "The Writings of George Washington, being his Correspondence, Addresses, Messages, and other Papers, official and private, selected and published from the original Manuscripts, with a Life of the Author, Notes and Illustrations, by J. S.," consisting of twelve volumes, of all which volumes respectively the copyright was taken out by said J. S., previous to the publication thereof respectively, and secured according to law, the said J. S., at the time of taking out and securing said copyrights respectively, and still being a citizen of the United States, and the term of each and all of which copyrights has still more than eight years to run ; and that said F., W. & T., before the infringement hereinafterwards complained of, had, by an agreement with said J. S., undertaken and become interested in and assumed a part of the risk and responsibility of the publication of said work, and have ever since continued, and still continue, to be thus interested, and that ever since the first publication of the several volumes of said work, the public have been

supplied with copies of the same by said J. S. and the publishers of the same at reasonable prices ; and that said J. S. and said F., W. & T., have incurred very large expenses upon said publication, and have been and are in the receipt of large amounts, the proceeds of the sale of said work, to reimburse their expenses, and remunerate their labor and care bestowed on the same. And your orators further show that they, your orators, being in the receipt of large sums, the proceeds of the sale of said work as aforesaid, under said copyrights, B. M., N. C., and T. H. W., all of B., in the county of S., in said district of Massachusetts, and G. P. L., of C., in the county of M., in the district of N. H., booksellers, being copartners under the name, style, and firm of M., C., L. & W., and also C. W. U., of S., in the county of E., in said district of Massachusetts, clerk, all of them well knowing that said J. S. held such copyrights and said F., W. & T. were interested in the said publication, and deliberately, after due notice, intending to infringe said copyrights at said B., on the fifth day of August, in the year of our Lord eighteen hundred and forty, and at divers times before and since the said fifth day of August, without the allowance and consent of your orators, or either of them, published and exposed to sale and sold a work in two volumes entitled "The Life of Washington," in the form of an autobiography, the narrative being, to a great extent, conducted by himself in extracts and selections from his own writings, with portraits and other engravings, consisting of — pages in the whole, which they still continue to expose to sale, having had due notice, and well knowing that the same is a copy from, and an infringement and piracy of, said "Writings of George Washington, &c., with a Life of the Author," so published by your orators as aforesaid. And your orators aver that three hundred and eighty-eight pages of said piratical work are copied *verbatim et literatim* from the said work so edited and compiled by said J. S., as aforesaid, and so published by your orators as aforesaid, consisting of matter which was published originally by said J. S., under his said copyright, and which had never before been published or printed, and which he, the said J. S., and his assigns, had the exclusive right and privilege to print, publish, and sell and expose to sale ; and that many other parts of said piratical work published by said parties complained of, besides said three hundred and eighty-eight pages, are infringements upon said J. S.'s said copyrights, whereby your orators have sustained great damage, detriment, and injury. And your orators further show, that said M., C., L. & W. and U. still continue and threaten hereafter to continue to print, publish, and expose to sale and sell copies of the said piratical work, the protests, expostulations, and warnings of your orators to them to the contrary notwithstanding. All which actings, doings, and pretences are contrary to equity and good conscience, and tend to the wrong and injury of your orators in the premises. In consideration whereof and forasmuch as your orators are remediless in the

premises at law, and cannot have adequate relief, save in a Court of Equity, where matters of this and the like nature are properly cognizable and relievable, and to the end that said M., C., L. & W. and U. may appear and answer all and singular the matters and things hereinbefore set forth and complained of, particularly how many copies of said piratical work they have sold, what number they have on hand, and that they be restrained by injunction issuing from this Court from selling or exposing to sale, or causing or being in any way concerned in the selling or exposing to sale, or otherwise disposing of any copies of said piratical work, and that they be ordered and decreed to render an account of the copies of the same that they have sold, and to pay over the profits of such sales to the plaintiffs, and that they be ordered to surrender and deliver up the copies on hand and the stereotype plates of said piratical work to an officer of this Court to be cancelled and destroyed, and be ordered to pay the plaintiffs their costs ; and that your orators may have such other and further relief as to this honorable Court may seem meet, or as equity may require. May it please this honorable Court to grant to your orators a writ of subpoena directed to the said M., C., L. & W. and U., commanding them at a day certain, and under a certain penalty to be therein inserted, personally to be and appear before this honorable Court, then and there to answer the premises, and to stand and abide such order and decree therein as to this honorable Court shall seem agreeable to equity and good conscience.

*By their Solicitors.*

P. & R.

[Folsom v. Marsh, 2 Story C. C. 100.]

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49. *Bill charging infringement of copyright, calling for injunction, account, &c.*

To the Judges of the Circuit Court of the United States, for the District of Massachusetts :

S. S. G., of P., in the State of Rhode Island, and a citizen of the United States, brings this, his bill, against W. B., of P., in the county of P., and a citizen of the said district of Massachusetts, bookseller.

And thereupon your orator complains and says, that he is a citizen of the United States, and is author and proprietor of a certain book entitled "Greene's Analysis, a Treatise on the Structure of the English Language ; or the Analysis and Classification of Sentences, and their component Parts, with Illustrations and Exercises adapted to the use of Schools. By Samuel S. Greene, A. M., Principal of the Phillips Grammar School, Boston. Philadelphia : Thomas, Cowperthwaite & Co., 1848." The title of which said book was duly entered for securing the copyright thereof by the said

G., according to the act of Congress, on the nineteenth day of November, in the year of our Lord one thousand eight hundred and forty-six, in the Clerk's office of the District Court, of the district of Massachusetts, as by the record of such entry, remaining in said Clerk's office, fully appears; and your orator avers that he did all other acts and things required by law, for the securing of his said copyright, in the book aforesaid; and continued by his agents duly authorized to publish and sell the same, exclusively of all other persons, and under the protection of the copyright thus secured to him.

And your orator further shows, that he is the author and proprietor of a certain other book entitled, "Greene's First Lessons in Grammar. First Lessons in Grammar, based upon the Construction and Analysis of Sentences; designed as an introduction to the 'Analysis of Sentences.' By Samuel S. Greene, A. M., Principal of the Phillips Grammar School, Boston. Philadelphia: Thomas, Cowperthwaite & Co." The title of which said book was duly entered for the securing the copyright thereto by the said Greene, according to the act of Congress, on the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and forty-eight, in the Clerk's office of the District Court of the district of Massachusetts, as by record of such entry, remaining in said Clerk's office, fully appears; and your orator avers that he did all other acts and things required by law, for his securing of his said copyright in the book aforesaid, and continued, by his agents duly authorized, to publish and sell the same, exclusively of all other persons, under the protection of the copyright thus secured to him.

And your orator further shows, that the purpose and design of both of the said books is to teach children the formation and analysis of the English language; and that, in furtherance of this design, he has invented, arranged, composed, and set forth in both of the books aforesaid a new system for the division of all sentences of the English language into various classes, with new divisions and subdivisions; and your orator further says, that he has invented, applied, and set forth in both of said books new names to express and define these said classes, divisions, and subdivisions; and your orator further says, that he composed, arranged, and set forth in both of said books certain exercises, designed to teach and illustrate the formation and analysis of the sentences of the English language.

And your orator further shows, that the exclusive right to print, publish, and sell the several books aforesaid, the whole and every part of the contents of each of them was and is vested in your orator, and that your orator has expended large sums of money in preparing and printing editions of the said books, and has always had, and still has, a sufficient number of copies on hand, for sale to the public, at a reasonable price, and has always received, and still ought to receive, the profits thereof.

Nevertheless, the said defendant, contriving and intending to injure your

orator, without the license and consent of your orator, on the first day of January, in the year of our Lord one thousand eight hundred and fifty-three, at his shop in said P., published and exposed for sale, and sold, and still continues to publish and expose for sale, divers, to wit : ten thousand copies of a book entitled "Covell's Digest of English Grammar. A Digest of English Grammar, synthetical and analytical, classified and methodically arranged ; accompanied by a Chart of Sentences, and adapted to the Use of Schools. By L. T. Covell, Principal of the Fourth Ward Schools, Alleghany, Pa. Apply thine heart unto instruction, and thine ears to the words of knowledge. Prov. 23 : 12. New York : D. Appleton & Company, 200 Broadway. Pittsburg : A. H. English & Co. MDCCCLII." And furthermore, that the said defendant, on the thirteenth day of July, in the year of our Lord one thousand eight hundred and fifty-four, at his said shop, published and exposed for sale, and sold, and still continues to publish and expose for sale, divers, to wit : ten thousand copies of a book entitled "Covell's Digest of English Grammar. A Digest of English Grammar, synthetical and analytical, classified and methodically arranged ; accompanied by a Chart of Sentences, and adapted to the Use of Schools, Alleghany, Pa. Apply thine heart unto instruction and thine ears to the words of knowledge. Prov. 23 : 12. Second Edition. New York : D. Appleton & Company, 200 Broadway. Pittsburg : A. H. English & Co. MDCCCLIII." And said last-named book is a second edition of the first-mentioned book, published and sold by the defendant, and differs from said first-mentioned book only in a few unimportant words and phrases, and contains, in fact, all the matter and substance contained in the said first-mentioned book, although the words in which said matter and substance is expressed are not, in all cases, the same.

And the said books, so published, exposed for sale and sold by the defendant are violations and infringements of the said several copyrights of your orator ; in that they contain matter adopted from the said books of your orator, so copyrighted as aforesaid, describing and setting forth the said new system for the division of all sentences of the English language into various classes, with new divisions and subdivisions, invented and applied, as aforesaid, by your orator ; and, furthermore, in that they define, adopt, and use, in the same manner with your orator, the new names aforesaid, invented and employed by your orator to express and distinguish the aforesaid new classes, divisions, and subdivisions of the sentences of the English language ; and, furthermore, that the said book adopts and imitates the form and use of certain exercises for children, composed and arranged by your orator, for the purpose of teaching and illustrating the composition and analysis of the sentences of the English language ; and, furthermore, that the said books, published as aforesaid, and sold by the defendant, are substantially of the same plan and motive throughout with the aforesaid

books of your orator, and that they are intended to supersede the said books of your orator, in the market, with the same class of readers and purchasers, without introducing new matter, and with only colorable deviations.

And your orator further shows, that before the said C. had compiled, and before the defendant had published and sold the books hereinbefore complained of, the said C. had seen, read, approved of, and introduced as a text-book into the school of which he was the teacher, one or both of the said books of your orator, and that he recommended one or both of the said books of your orator to the favorable notice of other teachers and school directors, as a text-book better calculated to meet the wants of schools than any other work on grammar of which he had any knowledge at that time. And your orator further shows that, before the publication of his said books, the said C. had no knowledge of the system of analyzing sentences in the manner described and set forth by your orator in his said books; and afterwards described and set forth by the said C. in the books hereinbefore complained of, and published and sold by the defendant.

And your orator further shows, that D. A. & Company, of N. Y., the original publishers of the books hereinbefore complained of and sold by the defendant, had been informed, and knew that the said books, published by them as aforesaid, were infringements and violations of the said copyrights of your orator, and that in consequence of said information and knowledge, they directed the said C. to change and alter certain portions of his said first-mentioned book, so that in the said second edition thereof there might be less apparent similarity to the books of your orator, copyrighted as aforesaid; and that in consequence of said directions, the said C. did, in the preparation of the said second edition of said book, change and alter certain portions of his said first edition of said book, and made certain other colorable deviations, particularly in those parts and sections which your orator has hereinbefore complained are infringements and violations of his said copyrights, secured as aforesaid; and said changes, alterations, and deviations do not render said second edition more valuable, more instructive, or better suited for the use of teachers or pupils of schools than the said first edition, but that the said changes, alterations, and deviations were introduced into said second edition simply and solely for the purpose of diminishing the apparent similarity between the books published and sold by the said defendant, as aforesaid, and the books of your orator, under the false and mistaken supposition that by making certain small, unimportant, and colorable changes, alterations, and deviations, the said defendants could escape the penalty of the law in such case made and provided.

And your orator further shows, that, in consequence of the said defendant's having so exposed for sale, and sold, and of his continuing to expose

for sale, and sell, the books hereinbefore complained of, the sales of your orator's said books have been hindered and rendered less than they would otherwise have been; and that your orator will suffer a still greater diminution of his sales, and a still greater loss of his lawful and rightful profits of his said books, if the said books hereinbefore complained of shall continue to be sold or exposed for sale by the said defendants or any other person.

To the end, therefore, that the defendant may, upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters hereinbefore set forth and complained of, and especially, to answer and set forth :

1. Whether &c.
2. Whether &c., &c. [7 interrogatories.]

And that the defendant may be restrained, by injunction, from selling or exposing for sale, or causing, or being in any way concerned in the selling or exposing for sale, or otherwise disposing of any other copy or copies of the books hereinbefore complained of; and that he be ordered to render to your orator an account of the copies of the same that have been sold, and to pay over to your orator the proceeds of such sales; and that he be ordered to deliver up to your orator all the copies of said books that he has on hand; and that it be decreed that the defendant pay to your orator all the costs of this suit; and that the exclusive right and privilege of your orator to print and publish and sell his said books, and the matters hereinbefore charged to have been piratically taken from him as aforesaid may be established, and that your orator may have such other and further relief in the premises as to this honorable Court may seem meet, and as the nature and circumstances of the case may require. Therefore will this honorable Court grant unto your orator the writ of subpoena, issuing out of and under the seal of the Court, to be directed to the said W. B. of P., in the County of P., and district of Massachusetts, commanding him by a certain day, and under a certain penalty to be therein specified, to appear before this honorable Court, to answer upon oath the matters and things hereinbefore complained of, and abide the order and decree of the Court.

S. S. G.,

by

L. S., JR.

L. S., JR.,

*Solicitor of Plaintiffs.*

The defendant, W. B., is required to answer the interrogatories numbered respectively 1, 2, 3, 4, 5, 6, and 7.

## SECTION XIV.

*Bills to restrain the Infringements of Patent Rights.**50. Bill for injunction to restrain the infringement of a patent right, setting out recoveries at law and in equity.*

To the Judges of the Circuit Court of the United States for the District of Massachusetts :

In Equity.

E. H., Jr., of B., in the State of New York, and a citizen of the State of New York, brings this his bill against C. W., of B., in the State of Massachusetts, and a citizen of the State of Massachusetts :

And thereupon your orator complains and says, that he, being the original and first inventor of a new and useful improvement in sewing machines, fully described in the letters patent issued to him therefor, as hereinafter stated, and not known or used by others before his invention thereof, and not at the time of his application for letters patent therefor, in public use or on sale with his consent or allowance as the inventor ; and being a citizen of the United States, and having made due application, and having fully and in all respects complied with all the requisitions of the law in that behalf, did obtain letters patent therefor, issued in due form of law to him in the name of the United States, and under the seal of the Patent Office of the United States, and signed by N. P. T., acting Secretary of State, and countersigned by H. H. S., Acting Commissioner of Patents, bearing date the tenth day of September, in the year of our Lord eighteen hundred and forty-six, whereby was granted and secured, according to law, to your orator, his heirs, administrators, or assigns, for the term of fourteen years from said date, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement in sewing machines therein specified and claimed, as in and by said letters patent, or a certified copy thereof, here in Court to be produced, will more fully appear.

And your orator further shows unto your honors, that certain assignments of certain rights in said patent have been made and duly recorded in the Patent Office of the United States, whereby your orator, prior to the infringements herein complained of, became and now is the sole owner of said patent ; as in and by said assignments or certified copies thereof here in Court to be produced will more fully appear.

And your orator further shows unto your honors, that the said improvement in sewing machines, patented to him as aforesaid, has hitherto been in the exclusive possession of your orator or his grantees ; and has hitherto

been and still is of great value and profit to your orator ; and that a license fee or patent rent, under his said patent, has hitherto been and still is paid to your orator for the largest portion of all the sewing machines manufactured and sold in the United States ; yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right, and in violation of said letters patent, and your orator's exclusive rights, secured to him aforesaid, has made, used, or vended, and still does make, use, or vend to others to be used in said district and in other parts of the United States, a large number of sewing machines, but how many your orator cannot state, but prays that the defendant may discover and set forth each, embracing substantially the improvement in sewing machines, or a material part thereof, patented to your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

And your orator further shows unto your honors, that heretofore the validity of his said patent has been uniformly affirmed after severe and repeated contestation, namely, by a verdict and judgment thereon at law, in 1852, and by six final decrees in equity in the Circuit Court of the United States for the district of Massachusetts, and by one final decree in equity in the Circuit Court of the United States for the southern district of New York, all obtained in favor of said patent prior to August, 1854.

And your orator further shows unto your honors, that the sewing machines made and sold by the defendant, as herein complained of, are, in their essential parts and character, substantially like the sewing machines against which injunctions were obtained in the suits aforesaid, by your orator, or by your orator and his then co-owner of said patent.

And your orator has requested the said defendant to desist from making, using, or vending to others to be used, the said sewing machines, embracing the said improvement patented to your orator, and to account with and pay over to your orator the profits made by said defendant by reason of the unlawful making, using, or vending of said sewing machines embracing said patented improvement of your orator. But now, so it is, may it please your honors, that said defendant has combined and confederated with other persons, to your orator unknown, but whom, when discovered, your orator prays leave to make defendants hereto, to resist and destroy the exclusive rights and privileges secured to your orator as aforesaid, and to make, use, and vend said improvement in sewing machines, patented to your orator as aforesaid, without the license of your orator, and in violation of his just rights in the premises, all of which is contrary to equity and good conscience.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein prayed, and may, under oath, and according to his best and utmost knowledge, remembrance, information, or belief, full, true, direct, and perfect answer make to all and singular the premises, and more especially may answer, discover, and set forth, whether during any and what period of time, and where, he has made, used, and vended to others to be used, for any and what consideration, any, and how many, sewing machines, and whether or not the same embraced the said improvement in sewing machines, or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using, or vending of sewing machines, embracing said improvement patented to and vested in your orator as aforesaid, and may be restrained by an injunction to be issued out of this honorable Court, or by one of your honors, according to law in such case provided, from making, using, or vending any sewing machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines, now in the possession or under the control of the defendant, may be delivered up to your orator, or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet.

May it please your honors to grant unto your orator, not only a writ or writs of injunction, conformable to the prayer of this bill, but also a writ or writs of subpoena to be directed to the said C. W., and confederates, when discovered, commanding him and them, at a certain time, and under a certain penalty, therein to be limited, personally to be and appear before your honors in this honorable Court, then and there to answer unto this bill of complaint, and to do and receive what to your honors shall seem meet in the premises.

E. H., JR.

51. *Another form of bill to restrain infringement of patent-right — title having been established in previous suit — account, &c.*

To the Judges of the Circuit Court of the United States for the District of Massachusetts:

. C. G., of N. H., in the State of C., and the Union India Rubber Company, a corporation duly established by the laws of the State of N. Y., bring this, their bill of complaint, against the Beverly Rubber Company, a corporation duly established by the laws of Massachusetts.

And thereupon your orators complain and say, that before the fifteenth

day of June, eighteen hundred and forty-four, the said C. G. became, and was the first and original inventor of a certain "new and useful improvement in India Rubber fabrics," which your orators verily believe had not been known or used before his invention thereof, and which was not at the time of his application for a patent therefor in public use or on sale with his consent or allowance; and being such first and original inventor, and being desirous of obtaining an exclusive property in the invention by him made, the said C. G. made application in writing to the Commissioner of Patents, expressing such desire, and delivered a written description of his invention or discovery, and a specification of improvement by him claimed: whereupon such proceedings were had, that on the fifteenth day of June, eighteen hundred and forty-four, letters patent of the United States, entitled for "a new and useful improvement in India-rubber fabrics," signed by J. C. C., Secretary of State, and countersigned and sealed with the seal of the Patent Office, by H. L. E., Commissioner of Patents, were issued to your orator in due form of law, granting to your orator, C. G., his heirs, administrators, or assigns, for the term of fourteen years from the day of the date thereof, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof was annexed to the said letters patent.

And your orators further show, that afterwards the said C. G. surrendered the said last-mentioned letters patent to the Commissioner of Patents, in due form of law, and such proceedings were had that said Commissioner did, on the twenty-fifth day of December, eighteen hundred and forty-nine, reissue to said C. G. letters patent of the United States, entitled for a new and useful "improvement in processes for the manufacture of India-rubber," signed by T. E., Secretary of State, and countersigned and sealed with the seal of the Patent Office, by T. E., Commissioner of Patents, whereupon there was granted to your orator, said C. G., his heirs, administrators, and assigns, for the term of fourteen years, from the fifteenth day of June, eighteen hundred and forty-four, (being the date of the said surrendered letters patent,) the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof was annexed to said reissued letters patent, as by reference to the same, or to a true copy thereof hereunto annexed, and making a part of this, your orator's bill of complaint, will more fully and at large appear.

And your orators further show, that, soon after the granting of the said original letters patent, one H. H. D. commenced infringing the same, and that various suits were brought against him by your orator, C. G., at law and in equity.

A suit was also commenced by your orator, C. G., against E. S. and J. B. K., the agents of said H. H. D., for infringing said patent, in the

Circuit Court of the United States, for the district of Massachusetts, in the year 1845; and said H. H. D. and his said agents, E. S. and J. B. K., by their pleas, answers, and notices, denied that your orator, C. G., was the first and original inventor of the improvement described and claimed in said patent of June 15, 1844, and also denied that said patent was of any validity, for the reasons in said pleas, notices, and answers set forth, upon which allegations the parties were at issue; that said suits were pending in said Court till the fall of 1846, and for the trial of which preparation had been made on both sides.

And your orators further show, that said suits were settled upon the application of said H. H. D., and a written agreement was executed between said H. H. D. and your orator, C. G., whereby said H. H. D. agreed, among other things, to pay five thousand dollars for said settlement, and for a license to manufacture certain articles under said patent and other patents of your orator, C. G., and to pay a tariff therefor, and covenanted not to infringe said patent; and said H. H. D. then and thereby acquiesced in your orator's (said C. G.'s) rights, and acknowledged the validity of said patents, and said sum of five thousand dollars was paid by said H. H. D., and said suits were discontinued, except the said suit against E. S. and J. B. K., agents of said H. H. D., in which a verdict was taken and judgment entered up against them in favor of your orator, C. G., and satisfied as agreed between your orator (said C. G.) and said H. H. D., as by the record thereof now produced here in Court will fully appear; and your orators further show, that soon after said settlement and the discontinuance of said suit, said H. H. D. recommenced his infringement of said patent; whereupon, your orator, C. G., about the first day of November, eighteen hundred and fifty, filed his bill against the said H. H. D., in the Circuit Court of the United States for the district of N. J., setting out the said letters patent and the infringement thereof, praying an injunction and account against the said H. H. D.; to which bill of complaint the said H. H. D. filed his answer, denying the validity of the said letters patent, and setting up that some other persons than your orator, C. G., were the inventors of the thing patented by him, and that the said reissue to your orator, C. G., was fraudulent and void, and that your orator, C. G., had no title by reason thereof in his said invention: and issue being joined thereon, the parties proceeded to proofs, which were taken at great length and for a long time.

And your orators further show, that, the proofs in said cause being taken, the cause was brought to final hearing on its merits at the March term of the Circuit Court of the United States for the district of N. J., in the year eighteen hundred and fifty-two, before Justices G. and D., and by them held under advisement until the September term then next following, when the judgment of the Court was pronounced, and opinions delivered,

copies whereof are hereunto annexed. And the said Court then decided that both the said letters patent were valid in law, and that your orator, C. G., was the inventor of the improvement patented, as aforesaid, by your orator, C. G., and referred to in said bill of complaint; that the said re-issued letters patent were lawfully reissued, and by a decree pronounced in said cause, perpetually enjoined the said H. H. D. from making, constructing, using, or vending to others to be used, the said improvements, and ordered an account to be taken of the damages due your orator, C. G., by reason of the infringements of said H. H. D. already committed; as by reference to a true copy of the judgment of the Court, or to the record of proceedings therein, ready to be produced, will more fully and at large appear.

And your orators further show, that, from the granting of the said letters patent, until the hearing of the said cause against H. H. D., he had and enjoyed an exclusive possession and use of the said improvements, by himself and his licensees, except so far as the same were disturbed by said H. H. D., and those combined and confederated with him, and by a few other persons who from time to time began to violate his rights, but who uniformly acquiesced in them, and submitted to pay tariffs for their future enjoyment, when they became acquainted with your orator's (said C. G.'s) rights secured by his patent, so far as your orators have been informed and believe.

And your orators further show, that the annexed schedule, marked A, is a correct copy of the original letters patent aforesaid; the annexed schedule, marked B, is a correct copy of the letters of reissue aforesaid; and the annexed schedule, marked C, contains true copies of the opinions delivered as aforesaid by the Judges of the Circuit Court of the United States, for the district of N. J.

And your orators further show, that, on the fifteenth day of June, A. D. 1858, the honorable J. H., Commissioner of Patents of the United States, did, as such Commissioner, duly grant to said C. G. an extension of said letters patent of June 15th, 1844, as reissued December 25th, 1849, for the further term of seven years from the said fifteenth day of June, A. D. 1858, and that the certificate and award of such extension were, by the said Commissioner, duly indorsed on the letters patent, of which such extension was so granted.

And your orators further show, that, before the said extension, the said Union India-rubber Company held, under certain agreements, rights from said C. G., authorizing them to make various articles of India-rubber according to his process, so as aforesaid patented, and giving them the exclusive right to make clothing according to that process. That, on the twenty-third day of April, A. D. 1858, and afterwards, on the third day of July, A. D. 1858, said C. G., for a valuable consideration, executed and delivered to the said Union India-rubber Company certain agree-

ments continuing such rights. That all the agreements aforesaid are in full force, and true copies of them are hereunto annexed, those first mentioned being marked as Exhibit D, and the two last mentioned agreements being marked as Exhibit E.

And your orators further show, that the said Union India-rubber Company, before said extension, were, and ever since have been, and now are, engaged under said agreement in the business of making and selling India-rubber goods of various kinds, including clothing, which are made under the aforesaid several agreements, according to said process of C. G., patented as aforesaid.

And your orators further show, that, amongst all persons engaged in the manufacture of India-rubber within the United States, the term or phrase "Vulcanized Rubber Goods" is used and is understood by the defendants, and other persons in said business, to mean the fabric or product made according to said C. G.'s process, patented as aforesaid, and is so used and understood as the designation of all goods made of a compound of India-rubber in the original composition, whereof sulphur was present in any form or degree; such compound being in that state subjected to the action of artificial heat, so as to produce the chemical or other changes or effects described in said C. G.'s original and reissued letters patent, and the specifications thereto annexed. And your orators employ such phrase in this bill of complaint in the sense so explained.

And your orators further show, that, as they have been informed and believe, the said defendants, not only before the extension of C. G.'s aforesaid patent, but also since that time, have been, and they now are, engaged, without the license or consent of said C. G., or your orators, in making and selling, or causing or procuring to be made and sold, various kinds of goods of vulcanized rubber, which goods are included in the aforesaid rights of your orators. That the said defendants, in the making of such goods, have, as your orators are informed and believe, used a compound of India-rubber in which sulphur was present when the compound was subjected to the action of artificial heat, so as to produce the aforesaid changes or effects. But your orators are informed and believe that said defendants claim or pretend, as to the whole or some of such goods, that they do not subject the same to the particular degree of heat mentioned by C. G. in his aforesaid specifications, or that in some manner they avoid following exactly the process of manufacture so described by him. But your orators aver and charge, that the said pretence is unfounded, and that the goods so made by said defendants, or the compounds of which they are made, have, before the completion of the manufacture, at some time, been subjected to the treatment or process described by C. G. as aforesaid, or some treatment or process substantially or practically similar in its nature and the same in its effects.

And your orators further show, that, as they are informed and believe, the said defendants threaten to continue making and selling, or making or selling, or causing or procuring to be made and sold, or made or sold, such goods as are above described in this bill of complaint. And your orators say that they have been damaged and injured by such acts of the defendants, and apprehend being further injured in future by the repetition or continuance of such acts.

And your orators pray that said several papers heretofore referred to in this bill of complaint, and of which copies are annexed as aforesaid, may be taken as part of such bill, your orators being prepared to prove the execution of the several agreements aforesaid, and the issuing of said letters patent, and the giving of the opinions aforesaid in N. J., and being ready to produce all such documents and papers.

All which actings, doings, and pretences are contrary to equity and good conscience, and tend to the manifest injury of your orators in the premises.

In consideration whereof, and forasmuch as your orators can only have adequate relief in this court, where matters of this kind are properly cognizable and relievable ; To the end, therefore, that the said, The Beverly Rubber Company, and their confederates, when discovered, may, upon their respective and corporal oaths, and to the best and utmost of their respective knowledge, information, and belief, full, true, and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were now repeated, and they severally interrogated thereto, and more especially that they may set forth particularly :

*First.* — Whether the said suit was not brought against the said H. H. D. at the time and manner specified therein ; and whether it did not result as herein described.

*Second.* — Whether said Beverly Rubber Company has not made and sold, or caused and procured to be made and sold, clothing or other goods ; and if so, what kind and amount of articles in the manufacture of which, at any time during the process of manufacture, or in the completion thereof, there was used or employed a compound of India-rubber in which sulphur was present, to which compound, or the goods when made thereof, artificial heat was or had been applied, so as to produce in such compound or goods the effect of vulcanization.

*Third.* — Whether the said defendants have made and sold, or caused or procured to be made and sold, any, if so, what description and quantity of, goods of vulcanized rubber, or rubber compounded with sulphur, and subjected to the action of artificial heat, according to the process described in the aforesaid letters patent of C. G., or the specifications attached thereto.

*Fourth.* — Whether the said defendants have, since the said fifteenth day of June, A. D. 1858, made or sold, or caused or procured to be made or sold,

any, and if so, what description and quantity of, goods made of and from a compound of India-rubber, which compound had, at any time, or in any form, been subjected to artificial heat, so as to have become vulcanized within the meaning of that term as hereinbefore defined and used, or so as to become insensible to the action of heat or cold, or prevented from liability to decompose from the action of essential oils or animal perspiration. And that the defendants may answer the premises, and that they may be decreed to account with your orators for the quantity of articles which they have made in violation of the said letters patent or any of the rights of your orators, and to pay over to your orators such sums as may be proper as damages for such infringements, and that the defendants may be perpetually enjoined from any further violation of the rights of your orators, or of either of them. Or that your orators may have such other or further relief in the premises as may be consistent with equity and good conscience.

May it please your honors, the premises considered, to grant unto your orators the writ of injunction issuing out of, and under the seal of this honorable Court, directed to the said Beverly Rubber Company, commanding and strictly enjoining them, and each of them, not to manufacture, use, or sell, or cause or procure to be manufactured or sold, any articles of vulcanized rubber, or any articles made of a compound of India-rubber, in which sulphur is present in any form or degree, such compound, or the fabric made therefrom, having been at any time subjected to the action of artificial heat so as to be changed or affected in the manner described in the aforesaid letters patent or specifications, or so as to have become insensible to heat or cold, or not liable to decompose from the action of essential oils or animal perspiration, and from taking or selling any article made from a compound which has been, at any time, so vulcanized, or affected, or changed.

And also, the writ of subpoena issuing out of and under the seal of this honorable Court, directed to the said defendants, commanding them to be and appear at a certain day, and under a certain penalty therein to be expressed, before this honorable Court, to answer the premises, and to stand to, perform, and abide by such order, direction, and decree, as to your honors shall seem meet.

And your orators, &c.

E. M.

## SECTION XV.

*To restrain the Use of Trade Marks &c.*

52. *Bill by foreign plaintiffs, manufacturers in England of "Taylor's Persian Thread," to restrain the use of their names, trade marks, envelopes, and labels placed on thread of a different manufacture.*

To the Judges of the Circuit Court of the United States, for the District of Massachusetts :

J. T. and W. T., of the borough of Leicester, in that part of the United Kingdom of Great Britain and Ireland called England, manufacturers, subjects of Victoria the First, Queen of the said Kingdom, and aliens to each and all of the United States of America, and the Territories and District thereof, bring this bill of complaint against D. C., of F., in the said district of Massachusetts, manufacturer, a citizen of the said State of Massachusetts. And thereupon the said J. T. and W. T. complaining, say, that for many years past they have been very extensively engaged in manufacturing cotton thread at Leicester aforesaid, and vending the same in large quantities, not only in England, but throughout the United States, and in particular in the city of B., in said district. That their said thread is, and for many years has been, put up for sale on spools, and labelled on the top of the spools, "Taylor's Persian Thread" in a circle, in the centre of which is the number of the thread, and on the bottom of some of the spools, "J. & W. Taylor, Leicester," and on the bottom of others, "J. & W. Taylor," with the number of yards of thread on each spool, each spool usually containing two hundred yards or three hundred yards of thread, and the spools containing two hundred yards being black and labelled "200 yds." on the bottom of the spool, and those containing three hundred yards being red, and labelled "300 yds." on the bottom of the spools. And on the centre of some of the same labels on the bottom of each spool is stamped the symbol or print of the head and forepart of a lion rampant. And on the centre of other of said labels is stamped a coat of arms, the shield whereof contains a lion rampant, and over the same three balls, with the motto, "*In Deo confido.*" And your orators further say, that their spools so marked, stamped, colored, or labelled as aforesaid are put up for sale in paper envelopes, each containing one dozen of spools; which envelopes are prepared and stamped by your orators for said purpose, and some of said envelopes bear in raised letters stamped on them the inscription, "The Persian Thread, made by J. & W. Taylor, is labelled on the top of each spool Taylor's Persian Thread, and on the bottom J. & W. Taylor, Leicester. The above is for the protection of buyers against certain piratical articles of inferior quality, fraudu-

lently labelled with the name of Taylor." And on other of the said envelopes is stamped a coat of arms representing a shield, the upper division of which is gilt, and contains three red balls, and the lower division thereof is red, and contains the effigy of a lion rampant, with the motto under the same, "*In Deo confido.*" Your orators further show unto your honors that their said thread has been and is manufactured of various sizes and numbers, to meet the wants of the trade; and by means of the care, skill, and fidelity with which your orators have conducted the manufacture thereof for a series of years, their said thread has acquired a great reputation in the trade throughout the United States, and large quantities of the same are constantly required from your orators to supply the regular demand for the consumption of the country. And your orators have established agencies for the sale thereof to the wholesale dealers and jobbers in the cities of B., N. Y., P., and N. O., and in addition thereto your orators employ B. W., now residing in said city of N. Y., as their general agent for the United States, in relation to the sale of their said spool sewing cotton thread; and a mercantile firm of H. & C. are the agents of your orators for the sale of the same in the city of B. And your orators further show unto your honors that their said thread is known and distinguished by the trade and the public as "Taylor's Persian Thread," and that your orators were the original manufacturers thereof, and the first who introduced the same to the public. That your orators' said general agent, on or about the first day of March last past, hearing that complaints were made of the quality of "Taylor's Persian Thread," proceeded to investigate the cause of said complaint, and thereupon ascertained that a spurious article of spool sewing cotton thread was offered for sale by sundry jobbers in the said city of B., as and for your orators' "Persian Thread," and that such complaints had arisen from the fraudulent imposition of such spurious article upon the public. Your orators further show unto your honors that their said agent further ascertained, upon inquiry, and your orators charge the facts to be, that the said spurious thread so sold and offered for sale in the said city of B., or some of it, was furnished to the said jobbers by said D. C., either by him personally or by one F. D. E., of B., his agent in that behalf, and your orators are informed and believe that the said D. C. has sold the said thread, put up, marked, and designated as aforesaid in the said city of B.; that the said D. C., disregarding the rights of your orator, and fraudulently designing to procure the custom and trade of persons who are in the habit of vending or using your orators' said "Persian Thread," and to induce them and the public to believe that his said thread was in fact manufactured by your orators, has engaged extensively in the manufacture of sewing cotton thread, and caused the same to be put up for sale in envelopes and on spools similar to those used by your orators, and so colored and stamped and labelled as to resemble exactly the said spools and envelopes

used by your orators. And the said spool sewing cotton thread, prepared by the said D. C. and sold by him, and which he is engaged in selling as aforesaid, is an exact imitation of the same article which your orators had been manufacturing as aforesaid, and selling in the United States for many years before the said D. C. commenced his said fraudulent imitation thereof. And the said spurious article, although inferior in quality to the genuine Persian Thread manufactured by your orators, can only be distinguished therefrom, so exact is the said D. C.'s imitation as aforesaid, by a careful examination of its quality, and by its falling short in the number of yards contained on each spool from the number marked thereon as the contents thereof. And that the general appearance of the spurious article is the same as that of your orators' genuine thread, and well calculated to deceive those dealing in the purchase and sale thereof. Your orators further show unto your honors that their said general agent has obtained specimens of the said spurious Persian Thread, so sold by the said D. C. That in some of the specimens thus obtained, the thread is put upon black spools, and in other of said specimens the thread is put upon red spools, and said black and red spools are of the same size and appearance with those used by your orators, on the top of which spurious spools there is pasted a round paper label, partly gilt, on which is printed in a circle the words "Taylor's Persian Thread," and in the centre of the circle the number of the thread; and on the other end on the bottom of such spurious spools there is pasted a round paper label, on some of which is printed in a circle the words, "J. & W. Taylor, Leicester," and on others, "J. & W. Taylor," with the number of yards of thread on the spools, and across *others* of the labels on said black spools the letters and figures "200 yds.," and on said red spools the letters and figures "300 yards" are printed, and in the centre of the said labels there is impressed the figure or symbol of the head and forepart of a lion rampant. And in other of said specimens the thread is put on spools corresponding in all particulars to those herein just before described, except that the labels on the bottom thereof bear a coat of arms, the centre of the shield whereof contains a lion rampant, with three balls over the same, and with the motto under, "*In Deo confido.*" Your orators have also obtained specimens of the envelopes in which said D. C.'s spurious thread is put up and sold by him or his agents, which bear the same inscriptions, letters, and stamps that those used and employed by your orators bear. And in all these particulars of the labels on each end of the said spurious spools of thread, and the envelopes in which they are put up, they are exactly like the envelopes and the labels on the respective ends of the spools of your orator's genuine Persian Thread, as hereinbefore stated. Your orators further show unto your honors that they have not yet ascertained the extent to which the said D. C. has carried his said fraudulent imitation and sale of your orators' said thread. But your orators' said general agent has found

the same offered for sale to the trade in at least six wholesale or jobbing houses in the city of B., as Taylor's Persian Thread, — from which your orators believe, and they therefore charge, on their belief, that the said D. C. has been and is engaged in selling his said fraudulent and spurious imitation of your orators' Persian Thread to a large extent in various places in the United States, with intent that the same should circulate and be received and used by the public as Taylor's genuine Persian Thread. And your orators further show unto your honors that the fraudulent and inequitable conduct of the said D. C. is not injuring them in the sales of their said genuine Persian Thread, and the profits which they would otherwise reasonably make thereon ; but by the inferior quality and false measure of the said spurious Persian Thread is greatly prejudicing the reputation of your orators, said Persian Thread in the market, and unless the said imitation is discontinued or prevented, will ultimately destroy the character and standing of the genuine article. And your orators also charge that the said spurious article is a fraud and deception upon such of the citizens of the State of Massachusetts, and of the United States, as purchase the same, believing it to be the genuine article manufactured by your orators. And your orators further show unto your honors, that in the month of March last past, having discovered a portion of the aforesaid fraudulent conduct of the said D. C., your orators did file their bill of complaint before the Chancellor of the State of New York, wherein they set forth many of the facts which are in substance hereinbefore stated, and prayed for an injunction to restrain the said D. C. from the aforesaid fraudulent use of the name and trade marks of your orators, and the same was granted by the Court ; and the said D. C. having appeared and filed his answer to the said bill, did therein admit that he had used the name and trade marks of your orators in manner set forth in the bill aforesaid ; but denied that the article manufactured by him was of inferior quality to that manufactured by your orators ; and afterwards an application was made to the Chancellor to dissolve the injunction aforesaid, which last-mentioned motion is now before the said Chancellor, and by reason of the great number of causes depending before him, the aforesaid cause cannot be decided without great delay. And your orators are informed and believe it to be true that the said D. C. residing out of the jurisdiction of the Chancellor of the State of New York, can, with impunity, disregard the injunction aforesaid, and that he has continued to make sale in the city of B. and elsewhere of the said thread, put up, marked, labelled, and appearing precisely like that made, put up, and sold by your orators, and your orators continue to be greatly injured thereby. In consideration whereof, and forasmuch as your orators are remediless in the premises at common law, and cannot have adequate relief, save by the aid and interposition of this Court, to the end, therefore, that the said D. C., if he can show why your orators should not have the relief

hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the several interrogatories hereinafter numbered and set forth ; and that the said D. C. and his attorneys, solicitors, counsellors, agents, and servants may be enjoined and restrained from manufacturing, selling, or offering for sale, directly or indirectly, any spool cotton sewing thread manufactured by him, or any person other than your orators, under the denomination of "Taylor's Persian Thread," or on spools with the words "Taylor's Persian Thread," or "J. & W. Taylor, Leicester," or "J. & W. Taylor," printed, painted, written, or stamped, or attached or pasted thereon, or with your orators' said device of a lion rampant, or with their said coat of arms thereon ; or on spools so made or having any label, printing, or device thereon, in such manner as to be colorable imitations of your orators' said spool thread, usually known as "Taylor's Persian Thread," and that the said D. C. may be decreed to account to your orators for all the profits which he has made by the sale of his said fraudulent imitation of your orators' thread, and all the profits which your orators would have made on the sales of their genuine thread, but for the said D. C.'s inequitable and wanton piracy of their said name, spools, and labels ; and that your orators may have their costs and charges in this behalf paid by the said D. C. ; and that your orators may have such further and other relief in the premises as to your honors shall seem meet, and shall be agreeable to equity and good conscience. May it please your honors to grant unto your orators a writ of injunction, issuing out of and under the seal of this Court, to be directed to the said D. C., his attorneys, solicitors, counsellors, agents, and servants, therein and thereby commanding and enjoining them, under a certain penalty in the said writ to be expressed, according to the foregoing prayer of your orators. May it also please your honors to grant unto your orators a writ of subpoena, issuing out of and under the seal of this Court, to be directed to the said D. C., commanding him on a certain day, and under a certain penalty in the said writ to be inserted, personally to be and appear before your honors in this honorable Court, then and there to answer the premises, and to stand to, abide by, and perform such order and decree therein as to your honors shall seem meet, and shall be agreeable to equity and good conscience.

C. P. C. of Counsel,	}	J. & W. T., by B. W., their Agent and Attorney.
C. P. & B. R. C.,		
Solicitors.		

United States of America, District of Massachusetts, ss.

Personally appeared before me the above-named B. W., on this 2d day of December, A. D. 1843, and made oath that this bill in equity by him signed, in as far as it states matters within his knowledge, is true to his

knowledge, and in as far as it states matters within his belief, is true to his best belief. W. W. S., Commissioner &c.

Interrogatories to be answered by D. C.:

1. Whether or not have you manufactured and sold in Massachusetts or elsewhere, thread put upon black spools, on one end of each of which spools is pasted, or otherwise fastened, a circular paper label partly gilt, on which is printed in a circle the words "Taylor's Persian Thread," and in the centre thereof the number of the thread, and on the other end of each of said spools is pasted or otherwise fastened a circular white paper label, on which is printed in a circle the words "J. & W. Taylor, Leicester," and across the same label "200 yds.," and in the centre of the same label there is impressed the figure or symbol of a lion rampant.

2. Whether or not have you manufactured and sold in Massachusetts or elsewhere, thread put upon red spools, corresponding in all respects to the black spools described in the preceding interrogatory, except in the color of the spool and in the quantity of thread thereon; and in the letters and figures "300 yds." printed across the said white paper label?

3. What number of each kind of the said spools of thread have you manufactured and sold. State the same accurately, and distinguish the kind and number of the thread, and the number of black spools and the number of red spools so sold by you since you commenced selling the same, and the times when and the places where the same have been sold.

4. What have been the profits made or realized by you on the manufacture and sale of thread put upon spools colored, decorated, and fitted up in the manner described in the first and second interrogatories.

5. To whom and what persons in particular have you sold the said thread put up in the manner described in the first and second interrogatories?

6. Who is, and who has been, your agent in Boston for the sale of your thread put upon spools fitted up in the manner described in the first and second interrogatories?

7. Whether or not did you admit in an answer signed, sworn to, and filed by you in the Court of Chancery in and for the State of New York, to a bill of complaint therein pending wherein the said J. T. and W. T. are complainants, and yourself is defendant, that you have engaged in the manufacture of sewing cotton thread, which you have caused to be put up for sale on spools similar to those used by the complainants, and so colored, stamped, and labelled as to resemble exactly or as nearly as the same could be done, the said spools used by the complainants, and the said spool sewing cotton, which has been prepared and sold by you is an exact imitation of the same article which the complainants had been selling in the United States many years before you commenced manufacturing your thread.

8. Whether or not have you manufactured and sold in Massachusetts sewing cotton thread upon black spools and upon red spools, on one end of

each of which is fastened a circular paper label, described as in interrogatory numbered 1, and on the other end is fastened a circular paper label on which is stamped a coat of arms, the shield whereof contains a lion rampant, and over the same three balls, with the motto under the shield, "*In Deo confido*," and around said shield is printed in some of said labels, "J & W. Taylor, Leicester," and in others, "J. & W. Taylor," with the number of yards on said spools?

9. Whether or no have you put up and sold your sewing cotton thread, colored, stamped, and labelled in all or some of the modes described in this bill in envelopes or wrappers, some bearing in raised letters the inscription, "The Persian Thread, made by J. & W. Taylor, is labelled on the top of each spool Taylor's Persian Thread, and on the bottom J. & W. Taylor, Leicester. The above is for the protection of buyers against certain piratical articles of inferior quality, fraudulently labelled with the name of Taylor," and others bearing a coat of arms, the upper division of which is gilt, and has three red balls thereon, and the lower division is red, and has a lion rampant thereon.

C. P. and B. R. C., *Solicitors*.

[Taylor v. Carpenter, 3 Story C. C. 458.]

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## SECTION XVI.

### *By joint Owner in Reference to joint Property.*

53. *Statement in a bill to restrain a part of certain joint owners of a fund from transferring the certificates showing their right to it.*

Bill states that D. P., the plaintiff, and one J. C., of whom the defendants are the legal representatives, were the joint owners of a certain ship, called the Boston; that the ship was built and sailed on joint account, and that it was afterwards seized and detained in Naples, and subsequently sold; then the said J. C. died, and the defendants became his legal representatives. "That since the decease of the said J. C., under and by virtue of a treaty duly concluded between the government of the United States and the King of Naples, certain indemnification was and is provided to be paid to the citizens of the United States, whose property had been unlawfully seized and detained, or otherwise illegally disposed of, in the manner in said treaty set forth, and that by virtue of said treaty, and under the provisions thereof, your orator and the representatives and heirs of said J. C. had jointly and equally a large and just claim for indemnification for the detention, injury, and loss of freight, and damages consequent

thereon, of said ship and cargo at said Naples aforesaid, —, and that said defendants, the said R. C., J. C., C. C., and one E. W., of N. Y., a citizen of the state of N. Y., —, without the privity of your orator, and claiming to be the heirs-at-law of said J. C., deceased, did make claim and apply to certain commissioners, appointed by said United States, to ascertain and settle the claims of the citizens of the United States under said treaty, to have allowance and award made to them, the said defendants, and said E. W., of the full and whole amount of damage and injury sustained by the seizure and detention of said vessel and cargo, as aforesaid — and did then and there present to said commissioners the register of said vessel, so made as aforesaid, in the said name of the said J. C., deceased, as evidence that said vessel was the sole property of him, the said J. C., whose sole heirs said defendants and said E. W. claimed to be, and thereupon such proceedings were had that said commissioners, relying upon said register as evidence of the sole ownership by said J. C., deceased, of said ship, did allow and award to said defendants, and said E. W., a large sum of money, for and on account of the seizure and detention of said vessel and cargo, as aforesaid — and thereupon, pursuant to law in such case made and provided, the Secretary of the Treasury of the said United States did, thereafterwards, pursuant to said award, issue to said defendants, and said E. W., certain certificates, purporting to contain that said defendants, and said E. W., were entitled to be paid, and that they and their assigns should be paid out of the moneys received under said treaty, in certain proportions or specified sums, the amount of nine thousand four hundred and thirty dollars and eighty cents. And your orator further shows, that said defendants and said E. W. have received said certificates and now hold the same, and that your orator was justly, equitably, and in good conscience entitled to have received and been allowed and awarded one full moiety or half part of the amount so awarded to the defendants and said E. W., and that said certificates, or one moiety thereof in amount, and one moiety of all sums by said defendants and said E. W., or either of them, that have been or shall be received under and by virtue of said award and certificates, has been and will be received by said defendants and said E. W. in trust for your orator, as jointly and equally interested with said J. C., deceased, in such vessel, her freights and earnings.”

Bill prays for a writ of injunction to defendants, restraining them and each of them from any and all alienations, transfers, assignments, or other disposition of the said certificates, as also from collecting or receiving by them, or either of them, or any person in their behalf, of any sums of money, payable under or by virtue of the said certificates.<sup>1</sup>

<sup>1</sup> Affidavits were filed in this case to establish the utter insolvency of one of the defendants, and the low character and irresponsibility of the others. *Poor v. Carleton*, 3 Sumner, 70.

## SECTION XVII.

*Bill by Assignee to protect the Estate of Insolvent Debtor.*

54. *Bill for an injunction to restrain a citizen of Massachusetts from availing himself of an attachment of personal property in another state, in an action against an insolvent debtor, and thus preventing the same from coming to the assignee.*

To the honorable the Justices of the Supreme Judicial Court, sitting in Equity :

Humbly complaining show unto your honors your orators, P. B., of B., in our county of S., merchant, and W. D. and H. J., both of said B., counsellors at law, against C. F. and D. W., both of W., in our county of W., merchants, and partners under the style of C. F. & Co.

That they were, on the first day of July last past, legally appointed assignees, under the insolvent laws of this commonwealth, of J. N. and P. H., of said B., and S. D., of said W., merchants, and partners under the style of N., M. & Co., insolvent debtors, and that they accepted said trust.

That the said N., M. & Co., on the first day of June last, were insolvent, and had stopped payment.

That on said first day of June Messrs. G., E. & P., of P., in the State of P., were, and now are, indebted to the said N., M. & Co. in the sum of three thousand dollars.

That the said C., F. & Co. were, on said first day of June, and still are, creditors of said N., M. & Co. in the sum of twenty-two hundred dollars, and that they then knew that the said N., M. & Co. were insolvent and in contemplation of insolvency, and had stopped payment, and had reason to believe and did believe that proceedings in insolvency were about to be instituted by or against said N., M. & Co.

That the said C. F. & D. W. are both [citizens] of this commonwealth, and that their debt against said insolvents was contracted and is payable in this commonwealth.

That the said F. & W., with intent to obtain a preference over the other creditors of said insolvents, and to avoid the operation of the insolvent laws of this commonwealth, caused a suit to be instituted against the said N., H. & D., in said P., and caused an attachment by the process of foreign attachment to be made upon the effects of said N., M. & Co., in the hands of said G., E. & P., of said P., for the purpose of collecting said debt due by said G., E. & P. to said N., M. & Co., to the prejudice of the other creditors of said insolvents, said suit and attachment being prior to said insolvency proceedings, and still pending.

Wherefore your orators pray that the said N., H. & D. may be directed by a decree of this honorable Court to convey to them, the said assignees, the debt of said G., E. & P., for the benefit of the creditors of said insolvent debtors, and to be held and distributed by your complainants according to law.

And that the said F. & W. may be restrained by the order and injunction of this honorable Court from levying any execution which they may obtain in said action upon said credits in the hands of said G., E. & P., and be ordered and decreed to relinquish and abandon said attachment, and that your orators may have such other and further relief in the premises as to your honors may seem meet, and this case shall require.

May it please your honors to grant unto your orators a writ of subpoena, to be directed to the said J. N., P. H., and S. D., and to the said C. F. and D. W., thereby commanding them to be and appear before your honors in the Supreme Judicial Court to be holden in and for the county of Worcester, on a day and under a pain therein specified, and then and there full, true, direct, and perfect answers to make, but not under oath, to all and singular the premises, and further, to stand to, perform, and abide such further order, direction, and decree therein, as to your honors shall seem meet.

[Dehon v. Foster, 4 Allen, 545 ; 7 Allen, 57.]

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### SECTION XVIII.

#### *Bills by next of Kin for Account and Payment of distributive Shares.<sup>1</sup>*

55. *Bill by intestate's brother and sisters against his widow and administratrix for their distributive share of his estate ; and for an injunction against her and the bank, or other corporation, to restrain the sale of a sum of stock standing in deceased's name, under a suggestion of her intention to leave the country.*

To &c.

Humbly complaining show unto your honors, your orator and oratrixes, S. M., of &c., C. M., of &c., widow, and A. L., of &c., widow, that A. M.,

<sup>1</sup> See for substance of bill in such case, admitting and alleging grounds to avoid a settlement and adjudication in the Probate Court. Gould v. Gould, 3 Story, 516 ; see also the answer in that case. The Courts of the United States, as Courts of Equity, possess jurisdiction to maintain suits in favor of legatees and distributees for their portions of the estate of the deceased, notwithstanding there may be, by the local jurisprudence, a remedy at law on the administration bond, in favor of the party. This class of cases is of concurrent and not of exclusive jurisdiction. Pratt v. Northam, 5 Mason, 95. The bill in this case charged that all the debts of the testator had been paid, ex-

late of &c., gentleman, was, in his lifetime and at the time of his death, possessed of and well entitled to a considerable personal estate, consisting of moneys in the funds, debts due to him, household goods, plate, linen, china, wearing apparel, and divers other effects of a considerable amount and value, and particularly was possessed of a large number of shares in the stock of ——. And your orator and oratrixes further show that the said A. M., in and about the month of &c., departed this life, intestate, and without issue, leaving F. M., his wife, one of the defendants hereinafter named, and your orator, his brother, and your oratrixes, his sisters, and only next of kin him surviving. And your orator and oratrixes further show, that since the death of the said intestate, the said F. M., his wife, has obtained letters of administration of the goods, chattels, rights, and credits of the said intestate to be granted to her, by and out of the proper Court, and has, by virtue thereof, possessed herself of the personal estate and effects of the said intestate to a very large amount and value, and much more than sufficient to pay and satisfy his just debts and funeral expenses, exclusively of the said shares of stock. And the plaintiffs further show, that being entitled as brothers and sisters of the said intestate to a distributive share of his personal estate, the plaintiffs have frequently, by themselves and their agents, applied to the said F. M. and requested her to come to a full and true account with the plaintiffs for the personal estate and effects of said intestate, and to pay them respectively one third part each of one moiety of the clear residue thereof, with which just and reasonable requests the plaintiffs hoped the said F. M. would have complied. BUT NOW SO IT IS, &c. And the said defendant pretends that the personal estate and effects of the said A. M. were small and inconsiderable, and not more than sufficient to pay and satisfy his debts and funeral expenses, and that she has applied all such personal estate and effects in a due course of administration. Whereas the plaintiffs charge the contrary thereof to be truth, and so it would appear if the defendant would set forth, as she ought to do, a full and true account of all and every the personal estate and effects of the said intestate, which have been possessed or received by the said defendant, or by her order, or to her use, and of her application thereof. And the plaintiffs further charge that the said F. M. has declared to several persons that she means to obtain a transfer of the said shares of stock, and to sell and dispose of the

cept that due to the plaintiffs, and prayed for an account of the personal estate of the testator, and that if the same, exclusive of &c., was sufficient to pay the plaintiffs, that the executors might be decreed to pay accordingly; or in case of a deficiency of personal estate, that the executors might be decreed to sell enough of the real estate to make up the deficiency; and for general relief; see also, *Allen v. Simons*, 1 Curtis C. C. 122; *Mallett v. Dexter*, 1 Curtis C. C. 178; *Stearns v. Page*, 1 Story, 204; *Sands v. Champlin*, 1 Story, 376; *Gould v. Gould*, 3 Story, 516, 537; *Langdon v. Goddard*, 2 Story, 267.

same and to withdraw herself to —, with the produce thereof; and the corporations, in which such stock is held, intend to permit her to make such transfer. All which actings, &c.

And that the defendants may answer the premises, and that an account may be taken by and under the direction of this honorable Court of the personal estate and effects of the said intestate, A. M., possessed by or come to the hands of the said defendant, F. M., his widow and administratrix, or to the hands of any other person or persons, by her order or for her use; and also an account of the said intestate's debts and funeral expenses, and that the said intestate's personal estate may be applied in a due course of administration, and that the clear residue thereof may be ascertained, and that the plaintiffs respectively may be paid one third part each of one moiety of such clear residue, and that in the mean time the said defendant F. M. may be restrained by the injunction of this honorable Court from selling or disposing of or transferring the said stock, and that the — may be restrained from permitting such sale or transfer.

[*And for further relief.*] May it please, &c.

[*Pray subpoena and injunction against F. M., and the said — (corporations).*]

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56. *Bill by some of the next of kin of an intestate for payment of their shares of the estate. [Modern English Form.]*

1. A. B., late of &c., deceased, was, at the time of his death, possessed and entitled of and to a considerable personal estate.

2. The said A. B. died on the — day of —, [a widower and] intestate, leaving the plaintiffs and — and —, his children and sole next of kin, him surviving.

3. On the — day of — the defendant procured letters of administration to the goods, chattels, and credits of the said A. B. to be granted to him by the proper court for that purpose, and the said defendant thereby became and now is the sole legal personal representative of the said A. B.

4. The defendant, as such administrator as aforesaid, has taken possession of all the movable chattels of the said A. B., and has received certain sums of money in respect of debts which were owing to the said A. B. at the time of his decease.

5. The assets of the said A. B., which have come to the hands of the defendant, were and are much more than sufficient for payment of all the debts and funeral expenses of the said A. B., and he has paid or ought to have paid the same.

6. The defendant has, in fact, in his hands, a large surplus or residue in respect of the intestate's personal estate, which is divisible and ought to be divided amongst the plaintiffs and the said — and —, as his sole next of kin.

7. The plaintiffs have applied to the defendant to furnish them with an account of the personal estate of the intestate, and of the application thereof, and to divide the residue thereof amongst the plaintiffs and the said — and —, but he has refused so to do.

*Prayer.*

The plaintiffs pray as follows :

1. That an account may be taken of the personal estate of the intestate, come to the hands of the defendant, or of any person or persons by his order or for his use.

2. That an account may be taken of the debts and funeral expenses of the intestate.

3. That the clear residue of the personal estate of the intestate may be ascertained, and that one equal — part of such residuary estate may be decreed to be paid to each of the plaintiffs, and that another equal — part thereof may be decreed to be paid to the defendant, and to each of them, the said — and —.

4. [*Prayer for general relief.*]

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57. *Bill by feme covert and her children for a settlement, against the assignee of her husband, of her share in personal property, derived under a will. [Modern English Form.]*

In Chancery.

Lord Chancellor.

Vice Chancellor.

[*Title.*]

Humbly complaining, show unto his lordship, A. M., wife of —, the defendant, C. M., by — of —, her next friend, and D. E. and F. G., infants under the age of twenty-one years, by the said —, their next friend.

[*The bill states a case, showing that A. M. has become entitled to a share in the residuary estate of the testator, that C. M., her husband, has become bankrupt, and the defendants, — and — are his assignees.*]

No settlement or other provision for the due support and maintenance of the plaintiff, A. M., was made on the occasion of her said marriage with the defendant, C. M., or has at any time since been made.

The plaintiff, A. M., is therefore advised and submits, on behalf of herself and the other plaintiffs, her children, that they are entitled to have a proper settlement of part of the aforesaid sum of money, which is now held by the defendant, — [*the executor of the testator*], as the part and share of the plaintiff, A. M., in the residuary estate of the said testator.

The plaintiffs have, accordingly, frequently applied to the said last-named defendant, and also to the said — and — [the assignees], and have requested that they would consent and agree that a proper settlement should be made of the said sum, and in particular the plaintiffs have requested the said — [the executor], not to pay over the whole share of the said A. M. to the said last-named defendants, but to retain the same until such settlement or provision be made thereout as aforesaid; but they refused to comply with such requests.

*Prayer.*

The plaintiffs pray as follows:

1. That it may be declared that the plaintiff, A. M., is entitled, for the benefit of herself and the other plaintiffs, her children, to have a settlement made upon them and her other issue, if any, by the said C. M., out of the part or share to which the plaintiff, A. M., is entitled in the residuary estate of the said testator, now remaining in the hands of the said — [the executor].

2. That the proper directions may be given for the preparation and execution of such settlement.

3. That in the mean time the said defendant — [the executor] may be restrained by the order and injunction of this honorable Court from paying over or transferring to the defendants — and — [the assignees], or either of them, the said share of the plaintiff A. M. in the said residuary estate and effects or any part thereof.<sup>1</sup>

4. [For further relief.]

<sup>1</sup> *Equity for a settlement.* 1. The wife's equity for a settlement does not depend on any right of property in her, but rests on the control which Courts of Equity exercise over property falling under their dominion, and it is an obligation which the Court fastens upon the property, but not upon the right to receive. *Osborn v. Morgan*, 9 Hare, 432; 16 Jur. 52; 21 L. J. Ch. 218; ante, vol. i. p. 97.

2. As to the property to which this right extends, see *Barrow v. Barrow*, 18 Beav. & S. C. on appeal, 24 L. J. Ch. 267.

3. When it attaches, see ante, vol. i. p. 102; *Lloyd v. Mason*, 5 Hare, 149; *Baker v. Boyldon*, 8 Hare, 210.

4. As to amount or proportion of fund to be settled, see ante, vol. i. p. 99.

For instances where the Court has given the whole fund:—Bankruptcy of husbands *Re Wilson*, 1 Jur. N. S. 569, V. C. S.; Purchaser from assignee of husband, an insolvent, *Francis v. Brooking*, 19 Beav. 347; *Scott v. Spaskett*, 3 M. & Gor. 599; *Gent v. Harris*, 10 Hare, 383. Divorce *a mensa et thoro* obtained by the wife, *Barrow v. Barrow*, 18 Beav. & 24 L. J. Ch. 267; *In re Lewins Trust*, 20 Beav. 378.

Where the fund under £ 200, and the husband had become bankrupt, *In re Cutler*, 14 Beav. 220; 15 Jur. 911.

Where a part only of the fund has been settled, *Ex parte Pugh*, 1 Drew. 232; *Aubrey v. Brown*, 25 L. J. Ch. 446; 4 W. Rep. 446, V. C. W.

5. Terms or provisions of settlement. — In settling a wife's property under an order of the Court giving effect to her equity to a settlement, there is no established rule en-

## SECTION XIX.

*Bills of Interpleader.*

58. *To settle and adjust claims to money due under a bond or obligation — offer of money — injunction against suit.*<sup>1</sup> [*Modern English Form.*]

Between Sir H. M. and others, . . . Plaintiffs,  
and  
A. B., H. J., and M. J., his wife, [and three  
children, infants,] T. B., S. B., and R. J., Defendants.

[*The bill set forth a bond of the plaintiffs, who were partners together in trade, for payment of £ 18,000, to M. J., when she was unmarried; the marriage of the defendant H. J. and M. J., his wife, and the issue of the marriage, viz. the three infant defendants; a settlement made previously to their marriage, by which the bond, together with the principal money and interest thereby secured, was assigned to the defendants T. B., S. B., and R. J., upon certain trusts for the benefit of the said M. J., her said husband, and their issue, "but the plaintiffs are not acquainted with the particulars of the said settlement, and crave leave to refer thereto."*]

The said T. B., S. B., and R. J. claim to be entitled under the said settlement to receive the principal moneys and interest secured by the said bond.

The plaintiffs have lately discovered that the said bond or obligation is now in custody or possession of the defendant A. B., and he claims to be entitled thereto and the principal money and interest thereby secured.

On or about &c., a notice in writing was served upon the plaintiffs, by the solicitor of the last-named defendant, which is in the words following &c. [*Claiming the money.*]

[*Statement of applications to the plaintiffs by the defendant A. B., and of threats to prosecute an action or suit, and that he has actually sued out a*

*titling her to have the property limited, in the events of failure of issue of the marriage and of her dying in her husband's lifetime, upon such trusts as she shall appoint, and subject thereto upon trusts excluding the husband from any interest in the settled portion of the property. In the absence of special circumstances, the limitation in the events above mentioned should be to the husband. Carter v. Taggart, 1 DeG. M. & G. 286; 21 L. J. Ch. 216.*

<sup>1</sup> This is the bill in *Meux v. Bell*, 6 Sim. 175. It was settled by the late Mr. Jacob. In the case referred to, Sir Launcelot Shadwell, V. C., upon the argument of a demurrer by one of the defendants, held, that it was not necessary for the plaintiff upon his bill to offer to pay the money into Court, although, before he took any step in the cause, it was necessary that he should do so. The ordinary practice is, however, to offer by the bill to pay the money into Court. It will be perceived, too, that no case is suggested by the plaintiff for or on the part of any of the defendants.

*writ in the Court of — in the names of the said H. J. and M. J., his wife, against the plaintiffs.]*

The other defendants T. B., S. B., and R. J., also threaten and intend to commence and prosecute some proceedings at law or in equity against the plaintiffs, on the recovery of the amount due from the plaintiffs upon the said bond. Plaintiffs submit that the said defendants ought to interplead between themselves, the plaintiffs being ready and hereby offering to pay the same to such of the defendants as this honorable Court may determine to be entitled thereto.

The said last-named defendants ought to set forth the particulars of their respective claims to the moneys due upon the said bond or obligation, and how to make out the same.

*Prayer.*

1. That the defendants may answer the premises, and that the defendants may be decreed to interplead and settle and adjust between themselves their right or claims to or in the money due or payable under the said bond or obligation, the plaintiffs being ready and willing, and hereby offering to pay the moneys due and payable under the same to such of the said defendants as this honorable Court may determine to be entitled thereto.

2. That the said defendant A. B. may be restrained by the order and injunction of this honorable Court from prosecuting the said action so commenced by him as aforesaid against the plaintiffs; and that all the said defendants may be respectively restrained by the order and injunction of this honorable Court from prosecuting or commencing any other action or actions or legal proceeding or proceedings against the plaintiffs, or any or either of them, for the recovery of the moneys due or to become due or payable under the said bond or obligation, or any part thereof, or otherwise concerning the matters aforesaid.<sup>1</sup>

3. [*For general relief.*]

*Common affidavit to be annexed to bill in an interpleader suit.*

[*Title &c.*]

I, —, the above-named plaintiff, make oath and say, that the bill in this suit [*or, the bill hereunto annexed*] is not filed by me in collusion with

<sup>1</sup> In *Bignold v. Audland*, 11 Sim. 23, it was held, that, where a bill of interpleader is filed by the secretary or officer of a company on their behalf, the affidavit to be annexed to the bill ought to be, not that the plaintiff does not collude, but to the best of the plaintiff's knowledge and belief the company do not collude with the defendant, and if the bill is filed respecting a sum of money in respect of which interest is recoverable at law, the bill should contain an offer to pay interest, as well as the principal sum. The practice is for counsel to move, *ex parte*, for leave to pay the money into Court, and for an injunction.

*any* or either of the defendants in the said bill named, but such bill is filed by me of my own accord for relief in this honorable Court.<sup>1</sup>

*Another form of affidavit to bill of interpleader.*

In Chancery [*or Equity.*]

Between J. C., . . . Plaintiff,  
and  
——, . . . Defendants.

The said J. C. maketh oath and saith, that he has exhibited his bill of interpleader against the defendants in this cause without any fraud or collusion between him and the said defendants, or any or either of them; and that the said J. C. hath not exhibited his said bill at the request of the said defendants, or of any or of either of them, and that he is not indemnified by the said defendants or by any or either of them, and saith that he hath exhibited his said bill with no other intent but to avoid being sued or molested by the said defendants, who are proceeding, or threaten to proceed, at law against him for the recovery of the rent of the said —, in the bill mentioned.

Sworn, &c.

J. C.

59. *Prayer in a bill of interpleader by an insurance company. [Modern English Form.]*

1. That the defendants — and R. S. may interplead together, and that it may be ascertained to whom the said sum of &c. and the interest thereon belongs and ought to be paid, and that the plaintiff, on behalf of the said Atlas Insurance Company, may be at liberty to pay the said sum of &c., with interest thereon at the rate of — per cent per annum, from the — day of —, into the bank of England in the name of the Accountant-General of this honorable Court, in trust in this cause, (which the plaintiff hereby offers to do,) for the benefit of such of the said parties as shall appear to be entitled thereto.

2. That the defendants may be restrained by the order and injunction of this honorable Court from further proceeding with the said action so commenced, &c., and from commencing any other action or actions at law against the said company, or the secretary thereof, in respect of the matters aforesaid.

<sup>1</sup> In *Stevenson v. Anderson*, 2 V. & B. 407–410, Lord Eldon observed that the form of affidavit in *Harrison's Practice* seemed to go too far in stating that the bill was filed without the "knowledge" of either of the defendants.

60. *Affidavit of secretary to public company to be annexed to bill in interpleader suit.*

I, H. D., of &c., make oath and say, that I am secretary of the — Insurance Company, and that I do not, and to the best of my knowledge and belief the said Insurance Company do not, nor do or does any members or member thereof, collude with either of the defendants named in the bill hereunto annexed, but such bill is filed by me, on behalf of the said company, of my own accord for relief in this honorable Court [*or, if the company is plaintiff say, "but such bill is filed by the said company of its own accord, for relief," &c.*]

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61. *Statements in a bill by a purchaser against different persons, claiming payment for the property purchased.*

Bill states that on the — day of —, the plaintiff purchased of the defendant, Salter, a cargo of coal, then on board of a vessel, at ten dollars per chaldron, amounting to 1125 dollars, payable in a note at thirty days. The coal was delivered to the plaintiff, who paid Salter one hundred dollars on account. That the defendants, P. & S. Schermerhorn, afterwards issued an attachment against W. W., as an absent debtor, and the defendants F. & B. caused another attachment to be issued against W. W., as an absconding debtor, and warrants were issued, in the usual form, to the sheriff of —, who gave notice to the plaintiff not to pay over to any person, except the sheriff, any property or money of W. W., and the plaintiff was informed by the sheriff, and the attorneys of the defendants P. & S. S., and F. & B., that the coal so purchased by him was the property of W. W., for whom the defendant Salter was only an agent, and that the plaintiff would be held liable, if he paid the residue of the money to Salter. That the plaintiff applied to the defendants for leave to pay the money to Salter, without responsibility; and he, also, applied to Salter, to relieve or secure him against the operation of the attachment, and any further responsibility, which they respectively refused to do, and that Salter had commenced a suit at law against the plaintiff to recover the money. The plaintiff averred that he was always ready and willing to pay the money, if he could do so safely, and offered to pay it into Court. He prayed for an injunction to restrain the suit at law, and for relief generally. The bill was accompanied with the usual affidavit, denying any collusion and indemnity, &c. Upon the plaintiff's paying the money into Court, an injunction was granted.

[Richards v. Salter et al., 6 John. Ch. 445.]

62. *Prayer that the defendants may interplead — that plaintiff may be at liberty to pay the arrears of rent into Court, first deducting thereout certain sums for repairs and land-tax — that possession may be delivered to the party entitled, and an allowance made to the plaintiff for certain articles — and for an injunction to restrain proceedings in ejectment and distresses being made upon the premises.*

And that the said several defendants may be decreed to interplead touching their said several claims, and that plaintiff may be at liberty to pay the several sums now justly and fairly due from him for the rent of the said messuage or tenement and premises into the bank, in the name and with the privity of the accountant-general, [or of the clerk] of this honorable Court, in trust for the benefit of the persons or person entitled thereto, subject to the further order of this Court, after deducting thereout in the first place, the aforesaid sum of —, to be allowed unto plaintiff for repairs pursuant to the said agreement, together with all sums of money expended and advanced by the plaintiff for land-tax and other necessary outgoings in respect of the said premises. And that plaintiff may be at liberty to quit the possession of the said premises, and that possession thereof may be delivered up to such person or persons as this honorable Court shall direct or appoint. And that plaintiff may have a satisfaction or allowance made out unto him out of the rent of the said premises for the several articles hereinbefore, and in the said first agreement particularly mentioned, which have been provided by plaintiff at his own expense for the said premises. And that in the mean time the said defendants, S. O. and T. C., may be restrained by the order or injunction of this honorable Court from all further proceedings in the aforesaid action of ejectment brought against plaintiff, and that they and all the said other defendants may be in like manner restrained from making any distresses or distress upon the said messuage or tenement and premises, and from commencing or prosecuting any action or actions at law against plaintiff to recover the rent of the said premises, or to turn plaintiff out of possession thereof, or otherwise from proceeding at law against the plaintiff touching any one of the matters aforesaid. And that all proper and necessary directions may be given for the purposes aforesaid. [*And for further relief.*]

63. *Amended bill of interpleader—by an executor—praying injunction against suits, and offering to bring fund into Court.*

SUPREME JUDICIAL COURT. April Term, 1861.

SUFFOLK, ss.

In Equity.

C. G. L., Executor of I. T.,

*vs.*

I. T. *et al.*

And now the said complainant, [plaintiff,] with the consent of the defendants, and by leave of Court, files his amended bill in the words and figures following, to wit:

This complainant [plaintiff] alleges that I. T., of Boston, merchant, deceased, in and by his last will and testament, which was duly proved and allowed, appointed your orator [the plaintiff], and F. D., and C. B., whom he hath survived, executors; and, among other things, made a provision for the benefit of his son Andrew, in the words following, to wit: "I give to my son Andrew . . . . forty thousand dollars, of which one half, or twenty thousand dollars, is to be placed by my executors with the Massachusetts Hospital Life Insurance Company in such manner that my said son shall receive the interest and income thereof during his life, and at his decease the principal shall be paid to his lawful heirs; the other half, or twenty thousand dollars, is to be paid to my said son for his own use, and to be at his own disposal, the whole forty thousand to be so placed and paid, as aforesaid, within one year after my decease, and as the same can be raised to the best advantage": as will more fully appear by reference to the said will.

That the said executors, on the sixth day of December, A. D. 1832, deposited the said sum of twenty thousand dollars with the said corporation for the benefit of the said Andrew, and received a receipt as and for an annuity, in trust, a copy of which is filed hereunto, and that the interest and income thereof was duly paid to the said Andrew during his lifetime.

That, as your orator [the plaintiff] has been informed, the said Andrew during his lifetime cohabited with a person named Katharina Bayerl, in parts beyond the seas, and that the said Katharina, on or about the twentieth day of September, 1848, bore a female child, afterwards named Anna, which she alleges to be the child of the said Andrew, and which, as she alleges, he afterwards acknowledged as such; but your orator has no knowledge of his own concerning these alleged facts.

That afterwards, as your orator [the plaintiff] has been informed, the said Katharina bore a male child, which was christened on the twenty-sixth day of May, 1851, by the name of Andreas, and as an illegitimate child of the said Katharina, which she also alleges to be the child of the said

Andrew, and that he afterwards acknowledged the same to be his son, but your orator [the plaintiff] has no knowledge of his own concerning these alleged facts.

That afterwards, on the fourth day of August, 1851, the said Andrew and Katharina, at the city of Frankfort-on-the-Main, in parts beyond the seas, made and signed a certain declaration in the words and figures following, to wit:

*Marriage Agreement.*

We the undersigned, Andrew Thorndike, of the city of Boston, county of Suffolk, and State of Massachusetts, aged sixty years, and Katharina Bayerl, of the city of Mainz, in the Grand Duchy of Hesse, aged twenty-six years, do hereby declare, that we have truly and solemnly promised to marry each other, and that we now both wish to enter in the state of marriage: and that we desire, in conformity with the laws of the United States of America, that the civil act of our union in marriage may be executed in the usual form before Ernest Schwendler, Esquire, the duly appointed Consul of the United States of America for this Free City. We therefore confirm, by these presents, our mutual consent to the desired conjugal union, and do sincerely and solemnly promise scrupulously to fulfil the duties of husband and wife, by virtue of our respective seals and signatures.

Frankfort-on-the-Main, Aug. 4, 1851.

(Signed) ANDREW THORNDIKE,

“ KATHARINA BAYERL.

Sealed and signed in presence of

(Signed) G. LINDHEIMER.

“ I. ECKHARDT,

as witnesses.

“The foregoing marriage agreement has, therefore, been entered accordingly, and duly subscribed by the aforesaid parties, not only in the Consular Register, but also on two duplicate copies of the present marriage act, delivered to the said parties at their request.

In testimony whereof, I have hereunto set my hand and seal of office, at Frankfort-on-the-Main, this fourth day of August, 1851, in the seventy-sixth year of the Independence of the United States.

(Signed) ERNEST SCHWENDLER, U. S. Consul. [L. s.]”; which was entered in the Register of the American Consulate in said city, and thereafterwards, as your orator [the plaintiff] is informed, the said Andrew and Katharina lived and cohabited together as man and wife until his decease, which occurred on or about the twenty-first day of July, 1854.

That by his last will and testament, which has been duly proved and allowed in this county, the said Andrew appointed N. I. B., of said Boston, and C. B., since deceased, executors of his will, who were duly appointed

as such, and he made divers provisions therein for the benefit of his wife Katharina, and son Andreas, so called, but none for the benefit of the said Anna, who is not mentioned therein.

That the surviving executor of the said Andrew, as your orator [the plaintiff] is informed, claims the right to receive from your orator the said sum of twenty thousand dollars, on the ground that by the will of the said I. T. the same was absolutely given to the said Andrew, and formed a part of his estate, subject to his disposal by will.

That the said Anna Bayerl, *alias* Thorndike, as your orator [the plaintiff] is informed, claims that she is the daughter of the said Andrew and Katharina, that they were afterwards lawfully married, and that he recognized her as his child after such marriage, and is, therefore, a lawful heir; and that she and her brother, the said Andreas, are entitled to have and receive the said sum of twenty thousand dollars, alleging that by the will of the said Israel a life interest on said sum only was given to the said Andrew, with remainder to his lawful heirs.

That the said Andreas Bayerl, *alias* Thorndike, as your orator [the plaintiff] is advised, insists that he is the son of the said Andrew and Katharina, that they were afterwards lawfully married, and that he, the said Andrew, afterwards recognized the said Andreas as his only child and heir-at-law, and that as such he is entitled to have and receive the whole of the said sum to his own use.

And the said Andrew, at the time of his death, had certain brothers and sisters then living, to wit: I. T., of the city of New York, merchant, a brother; A. L., of said Boston, widow, a sister; E. B., wife of the said N. I. B., and S. E. M., wife of R. M. M., of said Boston, merchant, surviving children of a deceased sister; E. F., E. A. T., and C. A. T., now or lately of Ravenna, Portage county, Ohio, sons of a deceased brother; E. T., M. A. B., wife of M. S. B., now resident at Paris, in the Empire of France; E. T. T., now resident in parts unknown; A. D. S., wife of E. de S., now resident at Paris, aforesaid; M. S. P., wife of R. T. P., of said Boston, daughters of a deceased brother; C. T., and A. T., a brother, who deceased after the said Andrew, having first made his will, which was duly proved in this county; and S. T. D., of said Boston, appointed executor thereof.

That the said brothers and sisters, and representatives of deceased brothers and sisters, or some of them, insist that by the will of said I. T. the said Andrew was entitled only to a life interest in the said sum of twenty thousand dollars, and that the remainder was given to his lawful heirs; that the said Andrew and Katharina were never lawfully married, and that the said Anna and Andreas are not the children of the said Andrew, or if either of them are, or is, that she or he were not born in wedlock, but were illegitimate, and not entitled to claim as lawful heirs, and that the brothers and sisters of the said Andrew, and the

representatives of deceased brothers, are the lawful heirs, and as such are entitled to have and receive the said sum of twenty thousand dollars to their own use.

That your orator [the plaintiff] is informed that the property of the said daughters of the said C. T. was settled in trust to their separate use, and that the said M. S. B. is the trustee of that belonging to his wife; that E. A. B., of said Boston, is trustee for the benefit of the said E. T. T. and A. D. S.; and that J. P., of said Boston, is trustee for the benefit of the said M. S. P.; but whether the said settlements, any or either of them, would include the interest to which the said daughters would be entitled if declared heirs-at-law, as aforesaid, your orator is not advised and does not know.

That J. G., of said Boston, counsellor-at-law, has been duly appointed, by the Court of Probate for this county, guardian of the said Andreas, and as such has demanded payment from your orator [the plaintiff] of the said sum of twenty thousand dollars; that the said I. T., before the filing of the original bill, had brought a suit at law against your orator, claiming his proportionate part of said sum as one of the lawful heirs; by reason of which your orator is exposed to great risk, and danger of trouble, expense, and litigation, and that various claims have been or may be preferred against him on behalf of some of the other persons herein-before mentioned.

That your orator [the plaintiff] is ready and willing to pay the said sum of money to such of the said persons, if any, as shall be found legally entitled to receive the same; but by reason that they persist in their several adverse claims, your orator [the plaintiff] is advised that he cannot safely pay the same, or any part thereof, to either of them; that the various persons claiming the same ought to interplead touching their respective rights, in order that your orator [the plaintiff] may be informed to whom the same ought to be paid; and that they and each of them ought to be restrained by the order and injunction of this honorable Court from commencing or prosecuting any suit at law or in equity against your orator [the plaintiff] in respect to the matters aforesaid.

To the end, therefore, that the said possible heirs-at-law, Andreas Thorndike, *alias* Bayerl, and his guardian, the said J. G.; the said Anna Thorndike, *alias* Anna Bayerl; the said N. I. B., surviving executor of the will of the said Andrew Thorndike; the said I. T.; A. L.; E. B. and her husband, the said N. I. B.; the said S. E. M. and R. M. M.; the said E. A. T. and C. A. T.; the said M. A. B. and M. S. B.; E. T. T.; A. D. S. and E. de S.; and the said E. A. B., trustee for the said E. T. T. and A. D. S.; the said M. S. P. and R. T. P., and J. P., her trustee; and the said S. T. D., executor of the will of the said A. T., may full and direct answer make to all and singular the premises, your

orator [the plaintiff] waiving the benefit of answers upon oath, and may set forth their several and respective claims, or disclaim all interest in and right to the said sum of money, or any part thereof, and that such of them, if any, as claim adverse interests therein may be decreed to interplead together, and that it may be ascertained, in such manner as the Court shall direct, to which of them the said sum of money ought to be paid; and that your orator [the plaintiff] may have leave to pay the same into Court, which he offers to do, for the benefit of such of the parties as shall be found or decreed to be entitled thereto; and that the said persons may, in the mean time, be restrained from commencing or prosecuting any suit at law against your orator [the plaintiff] in his said capacity, touching the said sum of money; and that he may have such other relief in the premises as the nature of the case may require.

May it please your honors to grant unto your orator [the plaintiff] a writ of subpœna, directed to the said several persons last named, commanding them to be and appear before this honorable Court, at a certain time and place, to make answer in the premises, and abide the order and decree of the Court therein.

F. C. L., } Solicitors for  
A. D., } Plaintiff.

*64. Bill by an executor, in the nature of an interpleader, to obtain instructions and advice of Court.*

To the Honorable the Justices of the Supreme Judicial Court, sitting in Equity.

W. T. A., of B., in the county of S., Esquire, brings his complaint against S. B., of said B., widow, and J. G. B., of said B., single woman, and W. W. S., of said B., and Hester V. A., of M., in the State of New Jersey, wife of Henry V. A., physician, and said Henry and C. W., of the city and State of N. Y., and the said H. V. A., as trustee of said C.

And the plaintiff shows that on the twenty-sixth day of March, A. D. 1860, T. W., of said B., Esquire, made his last will and testament; that T. W. departed this life on the thirtieth day of said March; that on the thirtieth day of April, of the same year, the said will was admitted to Probate, and letters testamentary issued to the plaintiff, the executor therein named.

2. That among other provisions of said last will and testament are these following, &c., as by reference to a certified copy of said will in Court to be produced will more fully appear.

3. That the real estate devised to the plaintiff, upon the trusts in said will recited, was, at the time of the decease of said T. W., subject to a mortgage for the sum of fifty-six hundred dollars and interest.

4. That the testator purchased said real estate of one S. R., and that it was conveyed to him by deed of said S. R., bearing date the second day of May, eighteen hundred and fifty-seven; that the consideration stated in said deed, and, as the plaintiff is informed and believes, the true consideration for the conveyance, was the sum of eighty-five hundred dollars; that after the description of the metes and bounds of the land in the said deed conveyed, the conveyance is "declared to be subject to a mortgage of fifty-six hundred dollars and interest, and also subject to the taxes for 1857, said mortgage forming part of the consideration; that said mortgage is excepted from and taken out of the covenants of said deed, as by reference to a copy of said deed in Court to be produced will more fully appear.

5. That the mortgage referred to in said deed was given by said R. and one L. B. L. to J. V. K., to secure the promissory note of said L., for said sum of fifty-six hundred dollars.

6. That after the conveyance of said estate to the testator, the testator paid the interest upon said mortgage as it became due to the said J. V. K., the holder thereof; that the testator, as the plaintiff is informed and believes, was desirous of taking up the mortgage and substituting his own note therefor, and offered to the said J. V. K., the holder of the mortgage, so to do; but the said J. V. K. expressed a preference to let the matter remain as it then stood.

7. That the said S. B. and J. G. B. claim that said mortgage debt is to be paid from the personal assets in the hands of the plaintiff, as executor.

8. That the said W. W. S. and others, residuary legatees, claim that the said real estate is devised to the plaintiff in trust for said S. B. and J. G. B., subject to the incumbrance of said mortgage, and that the plaintiff has no authority under said will to pay said mortgage debt.

9. And the plaintiff has no interest in the matter in controversy between the several defendants, but is advised that he cannot safely proceed in the matter without the direction and judgment of this Court sitting in equity, having no adequate remedy at law. Wherefore the plaintiff prays that the said several defendants may be decreed to interplead and state their several claims upon the plaintiff in the execution of his said trust as executor; so that the Court may adjudge whether a sufficient sum shall be taken from the assets of the estate in the hands of the plaintiff, to pay said mortgage debt and the interest thereon; or whether the same shall be paid to the defendants claiming under the residuary clause of said will.

To the end, therefore, that the said defendants may answer the premises, and that they may be decreed to interplead together; and that it may be ascertained by a decree of this honorable Court whether said mortgage debt shall be paid by the plaintiff from the assets of the testator in the hands of the plaintiff as executor; and that the plaintiff may have other needed relief in the premises;

May it please your honors to issue your writ of subpoena, directed to the several defendants, commanding them, and every of them, at a day certain, to appear before your honors, and then and there to answer all and singular the premises, and to stand to and abide such order and decree therein, as to your honors shall seem meet.

W. T. A.

(*Jurat.*)

[*Andrews v. Bishop*, 5 Allen, 490.]

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## SECTION XX.

*Bills for Payment of Legacies,<sup>1</sup> and also to carry the Trusts of Wills into Execution.*

65. *Bill against an executor by the husband of a deceased legatee for payment of her legacy.*

To, &c.

Humbly complaining, sheweth unto your honors your orator A. B., of &c., that W. S., late of &c., duly made and published his last will and testament in writing, bearing date on or about —, and thereby, amongst other bequests, gave to his nephews and nieces, the children of his late sister M. A., the sum of \$—— each, to be paid to them as they should respectively attain the age of twenty-one years, and appointed E. T. F., of &c., the defendant hereinafter named, the sole executor of his said will, as in and by the said will, or the probate thereof, when produced will appear. And your orator further sheweth that the said E. T. F., soon after the death of the said testator, duly proved the said will in the appropriate Court, and hath since possessed himself of the personal estate and effects of the said testator to an amount much more than sufficient for the payment of his just debts, funeral, and testamentary expenses and legacies. And your orator further sheweth that after the death of said testator, your orator intermarried with A. A., who was the niece of the said testator, and one of the children of the said M. A., in the said will named, and by virtue of said intermarriage your orator, in right of his said wife, became entitled to demand and receive the aforesaid bequest of \$——. And your orator further sheweth that your orator's said wife lived to attain her age of twenty-one years, and that she hath lately departed this life, and that neither your orator nor his said wife received any part of the said legacy. And your

<sup>1</sup> See *Princeton v. Adams*, Executor, 10 Cushing, 129; *Gray v. Sherman*, 5 Allen, 198; *Brown v. Brown*, 44 N. Hamp. 281. For form of decree in such case, see *Lupton v. Lupton*, 2 John. Ch. 629.

orator further sheweth, that, having obtained letters of administration to his said wife, he has repeatedly applied to the said E. T. F. for payment of the said legacy and interest thereon from the time of his said late wife's attaining her age of twenty-one years, and your orator hoped that such, his reasonable requests, would have been complied with, as in justice and equity they ought to have done. BUT NOW SO IT IS, &c. TO THE END, therefore, that, &c.

And that an account may be taken of what is due and owing to your orator for the principal and interest of the said legacy, and that the said defendant may be decreed to pay the same to your orator, and if the said defendant shall not admit assets of the said testator sufficient to answer the same, then that an account may be taken of the estate and effects of the said testator, which have been possessed or received by the said defendant, or by any other person by his order or to his use, and that the same may be applied in due course of administration. [*And for further relief.*] May it please your honors, &c.

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66. *Bill on behalf of infant legatees entitled to a sum of stock standing in the names of the executors, praying to have a guardian appointed, maintenance allowed for the time past and to come, an account taken of the dividends retained by the executors, and to have the stock transferred into the Accountant-General's name.*

Humbly complaining, show unto your honors the plaintiffs E. H., J. H., T. H., and M. A. H., infants under the age of twenty-one years, by J. E., of &c., their next friend, that E. H., the elder, late of &c., but now deceased, duly made and published his last will and testament in writing, bearing date, &c., whereby he directed that W. T., of &c., and E. B., of &c., the defendants hereinafter named, and C. G., of &c., who were the trustees and executors in his said will named, should, out of the moneys which should come to their hands in manner therein mentioned, lay out and invest in or upon government or real securities at interest the sum of \$—— upon trust, &c. [*The trustees were to pay the dividends to E. H., the testator's wife, during her life or until her second marriage, and after her decease or second marriage, the whole of the dividends to be applied by the trustees for the maintenance and education of testator's grandchildren, the plaintiffs, to whom the principal was to be transferred, to the grandsons at twenty-one, and to the granddaughters at twenty-one or marriage,*] as in and by, &c. And the plaintiffs further show that the said testator departed this life in or about the month of ——, without having in any manner revoked or altered the said will, except by a codicil bearing date &c., which did not relate to or affect the said trusts of the said sum of \$——. And the

plaintiffs further show unto your honors that W. T. and E. B., and the said C. G. duly proved the said testator's will, and acted in the trusts thereof, and out of the moneys which came to their hands from the estate and effects of the said testator, in or about &c., appropriated the sum of £ —, in satisfaction of the aforesaid legacy in the purchase of the sum of £ — 3 per cent consolidated bank annuities, and the said sum of stock is now standing in their names in the books of the Governor and Company of the Bank of England. And the plaintiffs further show that the said C. G. has departed this life, and that the said E. H., on or about &c., intermarried with and is now the wife of the said J. E., whereupon the interest of the said E. H., in the said sum of £ — 3 per cent consolidated bank annuities wholly ceased. And the plaintiffs further show that the said defendants paid to the said J. E. and E., his wife, the year's dividends which became due on the said sum of stock on the — day of —, as well for the interest of the said E. E. in the said stock as for the maintenance and education of the plaintiffs up to that time; but the said defendants have retained in their hands the subsequent dividends which have accrued due on the said stock, and have made no payments or allowances thereout for the maintenance or education of the plaintiffs. And the plaintiffs further show that some proper person or persons ought to be appointed as the guardian or guardians of the plaintiffs, with suitable allowances for their maintenance and education for the time past since the said — day of —, and for the time to come, and that the said sum of stock ought to be secured in this honorable Court. **TO THE END, therefore, &c.**

And that the said defendants may answer the premises, and that some proper person or persons may be appointed the guardian or guardians of the plaintiffs, with suitable allowances for their maintenance and education for the time past since the said — day of —, and for the time to come, and that the said defendants may account for the dividends of the said trust stock which have accrued due since the said — day of —, and may thereout pay the allowances which shall be made for the maintenance and education of the plaintiffs since the said — day of —, and may pay the residue thereof into this honorable Court for the benefit of the plaintiffs; and may also transfer the said sum of £ — 3 per cent consolidated bank annuities into the name of the Accountant-General of this honorable Court, to be there secured for the benefit of the plaintiffs, and such other persons as may eventually be interested therein. [*And for further relief.*] May it please, &c.

67. *Bill by legatees entitled to the testator's residuary estate in fifths, against the executors and trustees of the will; — praying to have the trusts of the will carried into execution, the accounts taken of the personal estate, debts, &c., and the rents of the real estate; — that the estate remaining unsold may be sold under the direction of the Court, and that the trustees may be charged with the losses occasioned by their not investing the produce of certain estates sold by them, according to the trusts of the will, — that the clear residuary estate may be ascertained and secured, &c.*

Humbly complaining, show unto your honors, the plaintiffs, J. A., of &c., S. P., of &c., widow, E. U., of &c., spinster, R. A., of &c., widow, and G. T. W., of &c., and A., his wife, that K. A., late of &c., duly made and published his last will and testament in writing, bearing date &c., which was executed and attested as by law is required for passing real estates by devise, and thereby, after giving two pecuniary legacies, the said testator gave, devised, and bequeathed all his estates and effects, as well real as personal, whatsoever and wheresoever, and of what nature, kind or quality soever, unto his brother, the plaintiff, J. A., and his friends W. U., of &c., and W. H., of &c., and S. S., of &c., two of the defendants hereinafter named, their heirs, executors, administrators, and assigns, [*upon trust to sell all his real estate, and in so doing to give a preference to his relations, and out of the produce to pay debts and legacies &c., and to invest £ —, to be payable to his niece, A. U., at twenty-one or marriage, who afterwards died in testator's lifetime, to pay his wife an annuity of £ —, and as to £ —, for such persons as his wife should appoint; and as to the remainder, one fifth to his nephew J. A., another defendant, and S. P., the children of his brother R. A.; one fifth to his nieces, plaintiffs, E. U. and R. A. and A. U., who died in testator's lifetime; one fifth to plaintiff J. A.; one fifth to the children of his brother R. A., and the remaining fifth part to the children of his sister M., then the wife of W. N.*] And the plaintiffs further show that the said testator afterwards duly made and published a codicil in writing to his will, bearing date &c., and executed &c., and thereby after reciting, &c., [*appointed J. R., of &c., J. K., of &c., two other defendants, and his wife S. A., executors, instead of those mentioned in said will; and stating that he had purchased some lands, directed them to be sold to pay debts and legacies &c., and the overplus to be placed out at interest, and gave to his wife the interest thereof, and the use of the furniture, and cows and horses for her life, and after her decease the principal to be paid to his nephews and nieces as directed by the will,*] as in and by &c. And the plaintiffs further show, that the said testator, K. A., departed this life on or about —, without issue, and without having altered or revoked his said will other than by the said codicil, and without having altered or revoked his

said codicil, leaving his nephew the said J. A., one of the defendants hereinafter named, who was the only son of the said R. A., the elder brother of the said testator, his heir at law; and thereupon the said S. A., the widow of the said testator, another defendant hereinafter named, and the said J. R. and J. K., the executrix and executor in the said codicil named, duly proved the said will and codicil in the appropriate Court and undertook the executorship thereof, and by virtue thereof possessed themselves of the personal estate and effects of the said testator to an amount and value much more than sufficient to pay and satisfy his funeral expenses, just debts, and legacies; and the said S. A., J. R., and J. K. also entered into the possession of the freehold and leasehold estates of the said testator, or into the receipts of the rents and profits thereof. And the plaintiffs further show that the plaintiff J. A. has not, nor had at the death of the said testator, any child, and that the plaintiff A. W. was at the death of the said testator the only surviving child of the said testator's brother R. A., and as such is sole legatee of one fifth of the said testator's residuary estate; and that W. N. the younger, who survived the said testator, but is since dead, and T. N., of &c., another defendant hereinafter named, were at the death of the said testator the only surviving children of the said testator's sister M., and as such were legatees as tenants in common of one other fifth part of the said testator's said residuary estate. And the plaintiffs further show, that the said W. N. the younger had before his death attained his age of twenty-one years, and that he duly made and published his last will and testament in writing, and thereby appointed his said brother, the said defendant, T. N., and J. H., of &c., and S. H., of &c., two other of the defendants hereinafter named, the executors thereof, who have duly proved the same in the appropriate Court, and are thereby become the legal personal representatives of the said W. N. And the plaintiffs further show, that the said A. U., afterwards A. L., one of the nieces of the said testator, having died in his lifetime, the one third of one fifth part of the said testator's said residuary estate bequeathed to her as aforesaid became lapsed. And the plaintiffs further show that the plaintiffs, except the plaintiff G. T. W., are the next of kin of the said testator, and were with the said W. N. the younger, deceased, and the said defendants, J. A. the younger, and T. N., the only next of kin of the said testator at his death, and are together with the said S. A., the widow of the said testator, entitled to divide the said lapsed legacy amongst them, according to the proportions specified in the statute of distributions. And the plaintiffs further show, that the plaintiff J. A. has on their part in a friendly manner repeatedly applied to the said defendants S. A., J. R., and J. K., and has requested them to come to a true and just account of their receipts and payments as executrix and executors, and in the trusts of the said testator's will, and to lay out and invest the said testator's resid-

uary estate upon proper security, particularly in the public or government funds, for the benefit of all parties interested therein; and the plaintiffs well hoped that the said S. A., J. R., and J. K. would have complied with such, the plaintiffs' reasonable requests, as in justice and equity they ought to have done. BUT NOW so IT IS &c., they refuse so to do. And the said defendants sometimes pretend that the personal estate and effects of the said testator were small and inconsiderable, and not sufficient to pay and satisfy his funeral expenses and just debts, and that they have been obliged to apply the rents, profits, and produce of the real estate of the said testator in aid of his personal estate in payment of his funeral expenses, debts, and legacies. Whereas the plaintiffs charge that the personal estate of the said testator was much more than sufficient for payment of his funeral expenses, debts, and legacies, and that so it would appear, if the said defendants would set forth, as they ought to do, a just and true account thereof, and of their application thereof; and the plaintiffs further charge that the freehold and leasehold estates of the said testator, or some of them, have been sold by the said defendants, and that a very large sum of money, but for the default and neglect of the said defendants, might have been produced therefrom, and invested upon the trusts of the said testator's will, to the great advantage of the residuary legatees, who are ultimately to divide the capital of the said residue; and the plaintiffs charge that the said testator died seized among other estates of a certain messuage, tenement, or farm, called &c.; and that the said defendants, under the pretence of some verbal agreement made by the testator in his lifetime, but which was in no manner binding upon them, have sold the said messuage, tenement, or farm at considerably less than its real value, or what the same would have produced at a public sale, and instead of laying out and investing the purchase-money in such manner as would be most for the advantage of the residuary legatees, defendants have permitted the purchase-money, or the greater part thereof, to remain in the hands of the purchaser on his personal security, and defendants have sold other parts of the real estates of said testator, by auction, particularly a part of his estate at &c. in a very improper and incautious manner, and have in like manner neglected to get in, lay out, and invest the produce thereof as should be most advantageous for the residuary legatees, and have permitted the same, or a greater part thereof, to remain on mortgage of the estate so sold as last aforesaid, and in such several sales have neglected to give a preference to the relations of the said testator, pursuant to the directions of his said will for that purpose. And the plaintiffs further charge, that the said defendant J. A. pretends that the said will and codicil of the said testator were not executed and attested so as to pass real estate by devise, and that he is thereupon entitled to the real estate of the said testator as his heir at law. Whereas the plaintiffs charge the contrary thereof to be true. And the

plaintiffs further charge that the said defendants, W. N. the elder, W. H., and J. O., who with the plaintiff J. A. are the surviving trustees and devisees named in the will of the testator, claim to have some legal estates or interest in the freehold property of the said testator, under and by virtue of his said will. And the plaintiffs charge that the said defendant, S. A., ought to have made out and signed, and should now make out and sign, upon oath, and deposit with one of the masters of this honorable Court for the benefit of all persons interested, an inventory of the horses, cows, and furniture which she claims to have the use of for life under the said will and codicil of the said testator. All which actings, &c. And that the said defendants may answer the premises, and that the said will of the said testator may be decreed to be well proved and the trust thereof performed and carried into execution; and that an account may be taken of the personal estate and effects of the said testator which have come to the hands or use of the said defendants S. A., J. R., and J. K., or either of them; and that an account may also be taken of the rents, profits, and produce of the real estates of the said testator, which have come to the hands or use of the said defendants, or either of them, or but for their wilful default or neglect might have been received by them, some or one of them. And that the estate of the said testator (if any) remaining unsold may forthwith be sold by and under the direction of this honorable Court, and that all proper parties may be decreed to join in such sales; and that the said defendants may be made answerable for such loss or losses as shall appear to have been sustained to the prejudice of the said testator's residuary estate, by reason of the said defendants having refused or neglected to lay out and invest the moneys produced by sale of the said testator's estates as hereinbefore mentioned, according to the trusts of the said testator's will and codicil, and that an account may be taken of such loss. And that an account may also be taken of the funeral expenses, debts, and legacies of the said testator, and that the same may be duly paid, and that the clear residuary estate of the said testator may be ascertained and secured by this honorable Court for the benefit of all persons interested therein. And that the defendant S. A. may sign and deposit with one of the masters of this honorable Court an inventory of the horses, cows, and furniture which she claims to be entitled to for her life, under the said testator's will and codicil. [*And for further relief.*] May it please, &c.

68. *Bill by the widow of a testator against the executors and trustees, claiming a share of the profits of a special partnerehip, as a part of her annual income under the will.*

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To the Honorable, the Justices of the Supreme Judicial Court, sitting in Equity.

Humbly complaining, sheweth unto your honors your oratrix, A. M. K., of B., in the county of S., widow of D. M. K., late of N., in the county of M., merchant; — that the said D. M. K., deceased, on the twenty-second day of February, A. D. 1860, leaving a last will and testament, which, on the twenty-eighth day of March, A. D. 1860, was duly proved and allowed by the Court of Probate for the county of M.; that in and by said last will he nominated and appointed as executors and trustees under the same, W. B., of B., in the county of S., J. B. L., also of said B., and G. G., of N., aforesaid; that the said J. B. L. declined to accept the said trust of executor or trustee, and letters testamentary were duly issued to the said W. B. and G. G., who accepted the said trust, and undertook and entered upon the execution of the same.

And your oratrix further shows, that the said D. M. K., by his last will and testament, after certain specific charges and legacies therein set forth, devised and bequeathed the rest and residue of his estate in the terms and manner following, to wit: [*State the provisions of the will on which the question in dispute arises.*]

And your oratrix further shows, that the two children of the said D. M. K., in said will mentioned, to wit: A. Moncrief K., and D. Malcom K., are minors, now residing in N. aforesaid, and that your oratrix is their legal guardian.

And your oratrix further shows, that, on or about the fourth day of September, A. D. 1858, the said D. M. K. became a special partner for the term of four years in the business of buying and selling dry goods with J. H., G. R. B., and J. T., merchants and copartners in B., aforesaid, under the name and firm of H., B. & T.; and the said D. M. K. contributed to the capital stock of said firm the sum of fifty thousand dollars, and by himself or his legal representative became entitled to receive a moiety of the net profits of the said partnership business; as by the written contract of partnership between the said H., B. & T., of the first part, and the said D. M. K. of the second part, bearing date the fourth day of September, A. D. 1858, and here in Court to be produced, and to which, for greater certainty, your oratrix craves leave to refer, more fully appears. And your oratrix avers, that said partnership still continues in full force, and

that the said executors and trustees have received therefrom, as the share of the net profits belonging to the estate of the said D. M. K., a very large sum of money, to wit, forty thousand dollars.

And your oratrix had well hoped that the said W. B. and G. G., executors and trustees, as aforesaid, would, upon the receipt from the said firm of H., B. & T. of a moiety of the net profits of their business, so as aforesaid to be paid to the said D. M. K. or his legal representative, pay over to your oratrix the portion of the same, by the provisions of the will of the said D. M. K., directed to be paid over to her.

But now, so it is, that the said W. B. and G. G., though requested, do utterly refuse to pay over to your oratrix any portion of the income derived by them from the said partnership business ; but, on the contrary, do claim and pretend that the profits accruing to them as executors and trustees, by virtue of the interest of D. M. K. and his legal representatives in said partnership business, do belong to &c., under the provisions of said will, are to be added to the principal fund of the residue of the estate of the said D. M. K., and are not to be added to, and do not form a part of, the income of said residue.

The contrary of all which your oratrix charges to be true, and expressly claims and avers, that, under the provisions of the said will, the share of the net profits of said partnership business, belonging and accruing to the estate of the said D. M. K., forms a portion of the income of the residue of said estate, and is to be added to all the other income arising from the residue of said estate, and that the whole amount thus made up constitutes the fund, of which, under the provisions of said will, after deducting charges and expenses, your oratrix is annually entitled to receive one third part, diminished only by the sum of seven hundred and fifty dollars, as directed in said will.

In consideration whereof, and because your oratrix is entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a Court of Equity, where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said defendants W. B. and G. G., and the said minor children, A. Moncrief K. and D. Malcom K., by a guardian for this suit, which your oratrix prays the honorable Court to appoint, may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the premises, as fully in every respect as if the same were here repeated, and they thereunto particularly interrogated, according to the best of their respective knowledge, information, and belief ; and that it may be determined by the judgment of this honorable Court whether, under the will of the said D. M. K., the share of the net profits of the business of the firm of H., B. & T., belonging to the estate of the said D. M. K., is and is to be taken as a part of the income, or as

part of the principal fund of the residue of the estate of the said D. M. K.; and that, if it shall appear that such share of the net profits of the said partnership business constitutes and forms a part of the income of said residue, the aforesaid defendants, W. B. and G. G., executors and trustees under said will, and their successors in said trust, may be ordered and decreed to account with your oratrix for the profits of said partnership business, and pay over to your oratrix such a proportion thereof as she is entitled to, under the provisions of the will of the said D. M. K.; and that your oratrix may have such other and further relief as the nature of her case may require, and to your honors may seem meet.

May it please your honors to grant unto your oratrix a writ of subpoena, to be directed to the said W. B., G. G., A. Moncrief K., and D. Malcom K., thereby commanding them, and every of them, at a certain day and under a certain penalty therein to be specified, personally to appear before your honors in this honorable Court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet, and your oratrix will ever pray.

A. M. K.

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## SECTION XXI.

### *Bills relating to Trusts.*

69. *Bill by an executor and trustee under a will, to carry the trusts thereof into execution.*

To &c.

Humbly complaining, shows unto your honors your orator C. R., of &c., executor of the will and codicils of M. S., late of &c., deceased, and also a trustee, devisee, and legatee named in said will and codicils, against J. G., of &c., &c., and E., his wife, and B. S., of &c., &c., and J. S. G., of &c., &c., that the said M. S., at the several times of making her will and codicils hereinafter mentioned, and at the time of her death was seized or entitled in fee simple of or to divers messuages, lands, &c., of considerable yearly value, in the several counties of C. and D., and being so seized or entitled, and also possessed of considerable personal estate, the said M. S., on or about —, made her last will and testament in writing, and which was duly signed and attested, and published by her, according to law, and thereby, after giving divers pecuniary and specific legacies and divers annuities, the said testatrix gave and devised unto your orator all &c. [*stating the substance of the will*]. And the said testatrix afterwards, on or about

——, made a codicil to her said will, which was duly signed, attested, and published, according to law, and thereby gave &c., and in all other respects she thereby confirmed her said will and all other codicils by her theretofore made; as by said will and the said several codicils thereto or the probate thereof, to which your orator craves leave to refer, when produced, will appear. And your orator further shows that the said testatrix M. S. departed this life on or about ——, without having revoked or altered her said will and codicils, save as such will is revoked or altered by the said codicils, and as some of the said codicils have been revoked or altered by some or one of such subsequent codicils; and the said testatrix at her death left the said E. G., formerly E. S., and the said B. S., her cousins and coheirresses at law. And your orator being by the said codicil of the —— day of ——, appointed sole executor of the said will and codicils, has since her death, duly proved the said will and codicils in the proper Court, and taken upon himself the execution thereof. And your orator further shows that the said testatrix, at the time of her death, was possessed of, interested in, and entitled unto considerable personal estate and effects, and, amongst other things, she was entitled to an eighth share and interest in a certain copartnership trade or business of a tin-blower and tin-melter, which was carried on by the testatrix and certain other persons, at ——, under the firm of S. F. & Co., in which the testatrix had some share of the capital, and which was a profitable business, and by the articles of copartnership under which the said business was carried on, your orator, as the said testatrix's personal representative, is now entitled to be concerned in such share of the said business for the benefit of the said testatrix's estate; and she was also possessed of or entitled to certain leasehold estates held by her for the remainder of certain long terms, &c. And your orator further shows that he has possessed himself of some parts of the said testatrix's personal estate, and has discharged her funeral expenses, and some of her debts and legacies, and your orator has also, so far as he has been able, entered into possession of the said testatrix's estates, which she was seized of, or entitled to, at the times when she made her said will and codicils, and which consisted of &c., being all together of the yearly value of \$—— or thereabouts, besides the said mansion-house, and besides the premises, which, by the said codicil, dated on —— day of ——, are devised to your orator for his own use and benefit; and your orator is desirous of applying the said testatrix's personal estate and effects, not specifically bequeathed, in payment of the said testatrix's debts, and of her legacies now remaining unpaid, and of the annuities bequeathed by the said will and codicils, so far as the same will extend, and of paying the remainder thereof out of the rents and profits of the said real estates, and of applying the whole of the rents and profits, according to the directions of the said will and codicils, as in justice and equity ought to be the case. BUT NOW SO IT IS, may it

please your honors, that the said J. G. and E., his wife, B. S., and J. S. G., in concert with each other, make various objections to your orator's applying the said personal estate, and the rents and profits of the said real estate, according to the directions of the said will and codicil ; and the said defendants J. G. and E., his wife, sometimes pretend, that by virtue of the said testatrix's will, they are entitled to the residue of the said testatrix's personal estate, not specifically bequeathed, including all her household estates, after payment of all her funeral expenses and debts, and that the said personal estate is not subject to the payment of the several legacies and annuities given by the testatrix's said will and codicils, but is exempt therefrom, and that all the said legacies and annuities ought to be paid out of the rents and profits of the said testatrix's real estates. Whereas your orator charges the contrary of such pretences to be true, and that the said personal estate is applicable to the payment of all the said testatrix's legacies and annuities, after satisfying all her funeral expenses and debts ; and the said J. G. and E., his wife, are desirous that your orator, as the personal representative of the said testatrix, should, by means of the said testatrix's share of the capital employed in the said trade or business, carry on the said trade or business for the benefit of them and of the said testatrix's estate, but which your orator cannot safely do without the direction and indemnity of this Court ; and the said J. G. alleges that he is not of ability to maintain and educate his said son, J. S. G., who is an infant of the age of ten years or thereabouts, and he therefore claims to have some part of the rents and profits of the said premises paid to him, for the maintenance and education of the said J. S. G. ; and your orator, under the circumstances aforesaid, is unable to administer the said personal estate, and to execute the trusts of the said real estates, without the directions of this honorable Court, and the defendants are desirous of having a person appointed by this Court to receive the rents and profits of the said real estates devised as aforesaid by the said fifth codicil, to which your orator has no objection. In consideration whereof, &c. To THE END, therefore, &c.

And that the trusts of said will and codicils may be performed and carried into execution by and under the direction of this Court, and that an account may be taken of the said testatrix's personal estate and effects, not specifically bequeathed, and of her funeral expenses and debts, and of the legacies and annuities bequeathed by the said will and codicils, your orator being ready and hereby offering to account for all such parts of the said personal estate as have been possessed by him, and that the said personal estate may be applied in payment of the said funeral expenses, debts, and legacies and annuities in a due course of administration, and that the clear residue, if any, of the said personal estate may be ascertained and paid to the said defendants J. G. and E., his wife, in her right ; and in case it shall

appear that the said personal estate, not specifically bequeathed, is not sufficient for payment of all the said funeral expenses, debts, legacies, and annuities, or that any parts thereof are not payable out of such personal estate, then that proper directions may be given for payment of such deficiency, or of such parts thereof as are not payable out of the said personal estate, according to the trusts of the said term of 100 years, vested in your orator as aforesaid and that an account may be taken of the rents and profits of the said real estates, comprised in the said term received by or come to the hands of your orator, and that the same may be applied according to the trusts of the said term; and that proper directions may be given touching the effects specifically bequeathed by the said will and codicils as heirlooms, and that proper inventories may be made thereof; and that all necessary directions may be given touching the application of a sufficient part of the rents and profits of the said real estates to the maintenance and education of the said J. G. S., in case this Court shall be of opinion that any allowance ought to be made for that purpose; and that a proper person may be appointed by this honorable Court to receive the rents and profits of the said real estates devised as aforesaid by the said fifth codicil. [*And for further relief.*] May it please, &c.

*Pray subpoena against J. G. and E., his wife, B. S. and J. S. G.*

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70. *Bill in behalf of infants to carry the trusts of a will into execution and to have the rights of parties declared—the widow having elected to take under the will—prayer for an account of the personal estate, and rents of the real estate received by the executors, and that they may be charged with interest for balances in their hands—also for an account of debts, &c.—for an injunction to restrain the executors from receiving any further personal estate or rents—for a receiver—and for the appointment of a guardian for the plaintiffs.*

Humbly complaining show unto your honors the plaintiffs R. M., W. M., H. M., J. M., &c., &c., infants, by A. B., of &c., their next friend, that P. M., late of &c., was at the time of making his will hereinafter mentioned, and at his death, seized in fee-simple of, or otherwise well entitled to, divers freehold messuages, lands, &c., situate, &c., and was also possessed of, interested in, or well entitled to a considerable personal estate, and that the said P. M. duly made and published his last will and testament in writing, bearing date on or about &c., which was duly executed and attested according to law, and was, amongst other things, in the words and figures, or to the purport and effect following [*state the will*]. And the plaintiffs further show that the said testator departed this life on or about &c., without revoking or

altering his said will, leaving R. D. M. now of &c., and one of the defendants hereto, who was then an infant, but has since attained his age of twenty-one years, his eldest son and heir at law. And the plaintiffs further show that P. M., of &c., W. M., of &c., and J. D., of &c., who were the executors and trustees in the said will named, and are three other defendants hereto, upon or soon after the death of the said testator duly proved the said will in the proper Court and took upon themselves the execution thereof and possessed the personal estate and effects of the said testator to a great amount, and the said defendants also entered into possession of the real estates of the said testator, or into the receipt of the rents and profits thereof, and have ever since continued and now are in such possession or receipt. And the plaintiffs further show that M. M., of &c., another defendant hereto, the widow of the said testator, has elected to take the provisions intended for her by the said will in lieu and bar of dower. And the plaintiffs further show that very large sums of money have been received by the defendants, the executors, and trustees of the said testator from his real and personal estate which have not been laid out and invested upon the trusts of the said will, and in particular the plaintiffs show that the said J. D. has now in his hands a balance due to the said testator's estate of the sum of \$ — and upwards. And the plaintiffs also show that the said P. M. and J. D. in or about the year — sold the shares and interest of the said testator in two ships called &c., to H. C. and W. J. of &c., for the sum of \$ —, for which they took the bond of the said H. C. and W. J. bearing interest at — per cent. And the plaintiffs further show that the said J. D. who is in possession of the said bond has given notice to the said H. C. and W. J. to pay to him the principal and interest due on the said bond on the — day of —, which principal and interest will amount to the sum of \$ —; and the said J. D. intends to receive the said sum of \$ — and to retain and apply the same to his own use. And the plaintiffs charge that the said will of the said testator ought to be established and the trusts thereof performed and carried into execution by and under the decree of this honorable Court, and that some proper person ought to be appointed by this honorable Court to collect the outstanding personal estate of the said testator, and to receive the rents and profits of his real estate. TO THE END, &c.

And that the said defendants may answer the premises; and that the trusts of the said will of the said testator may be performed and carried into execution by and under the decree of this honorable Court, and the rights and interests of the plaintiffs under the same may be declared and secured; and that an account may be taken of the personal estate of the said testator, and of the rents, profits, and produce of the real estate which have been possessed or received by the said defendants P. M., W. M., and J. D., or either of them, or by any other person or persons, by their or

appear that the said personal estate, not specifically bequeathed, is not sufficient for payment of all the said funeral expenses, debts, legacies, and annuities, or that any parts thereof are not payable out of such personal estate, then that proper directions may be given for payment of such deficiency, or of such parts thereof as are not payable out of the said personal estate, according to the trusts of the said term of 100 years, vested in your orator as aforesaid and that an account may be taken of the rents and profits of the said real estates, comprised in the said term received by or come to the hands of your orator, and that the same may be applied according to the trusts of the said term ; and that proper directions may be given touching the effects specifically bequeathed by the said will and codicils as heirlooms, and that proper inventories may be made thereof ; and that all necessary directions may be given touching the application of a sufficient part of the rents and profits of the said real estates to the maintenance and education of the said J. G. S., in case this Court shall be of opinion that any allowance ought to be made for that purpose ; and that a proper person may be appointed by this honorable Court to receive the rents and profits of the said real estates devised as aforesaid by the said fifth codicil. [*And for further relief.*] May it please, &c.

*Pray subpoena against J. G. and E., his wife, B. S. and J. S. G.*

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70. *Bill in behalf of infants to carry the trusts of a will into execution and to have the rights of parties declared—the widow having elected to take under the will—prayer for an account of the personal estate, and rents of the real estate received by the executors, and that they may be charged with interest for balances in their hands—also for an account of debts, &c.—for an injunction to restrain the executors from receiving any further personal estate or rents—for a receiver—and for the appointment of a guardian for the plaintiffs.*

Humbly complaining show unto your honors the plaintiffs R. M., W. M., H. M., J. M., &c., &c., infants, by A. B., of &c., their next friend, that P. M., late of &c., was at the time of making his will hereinafter mentioned, and at his death, seized in fee-simple of, or otherwise well entitled to, divers freehold messuages, lands, &c., situate, &c., and was also possessed of, interested in, or well entitled to a considerable personal estate, and that the said P. M. duly made and published his last will and testament in writing, bearing date on or about &c., which was duly executed and attested according to law, and was, amongst other things, in the words and figures, or to the purport and effect following [*state the will*]. And the plaintiffs further show that the said testator departed this life on or about &c., without revoking or

altering his said will, leaving R. D. M. now of &c., and one of the defendants hereto, who was then an infant, but has since attained his age of twenty-one years, his eldest son and heir at law. And the plaintiffs further show that P. M., of &c., W. M., of &c., and J. D., of &c., who were the executors and trustees in the said will named, and are three other defendants hereto, upon or soon after the death of the said testator duly proved the said will in the proper Court and took upon themselves the execution thereof and possessed the personal estate and effects of the said testator to a great amount, and the said defendants also entered into possession of the real estates of the said testator, or into the receipt of the rents and profits thereof, and have ever since continued and now are in such possession or receipt. And the plaintiffs further show that M. M., of &c., another defendant hereto, the widow of the said testator, has elected to take the provisions intended for her by the said will in lieu and bar of dower. And the plaintiffs further show that very large sums of money have been received by the defendants, the executors, and trustees of the said testator from his real and personal estate which have not been laid out and invested upon the trusts of the said will, and in particular the plaintiffs show that the said J. D. has now in his hands a balance due to the said testator's estate of the sum of \$ — and upwards. And the plaintiffs also show that the said P. M. and J. D. in or about the year — sold the shares and interest of the said testator in two ships called &c., to H. C. and W. J. of &c., for the sum of \$ —, for which they took the bond of the said H. C. and W. J. bearing interest at — per cent. And the plaintiffs further show that the said J. D. who is in possession of the said bond has given notice to the said H. C. and W. J. to pay to him the principal and interest due on the said bond on the — day of —, which principal and interest will amount to the sum of \$ —; and the said J. D. intends to receive the said sum of \$ — and to retain and apply the same to his own use. And the plaintiffs charge that the said will of the said testator ought to be established and the trusts thereof performed and carried into execution by and under the decree of this honorable Court, and that some proper person ought to be appointed by this honorable Court to collect the outstanding personal estate of the said testator, and to receive the rents and profits of his real estate. TO THE END, &c.

And that the said defendants may answer the premises; and that the trusts of the said will of the said testator may be performed and carried into execution by and under the decree of this honorable Court, and the rights and interests of the plaintiffs under the same may be declared and secured; and that an account may be taken of the personal estate of the said testator, and of the rents, profits, and produce of the real estate which have been possessed or received by the said defendants P. M., W. M., and J. D., or either of them, or by any other person or persons, by their or

either of their order, or for their or either of their use, and that in the taking of such account the said defendants may respectively be charged with interest for such balances as shall appear to have been in their hands from time to time, and that what shall be found due from the said defendants may be secured in this honorable Court for the benefit of all parties interested therein ; and that an account may be taken of the funeral expenses, debts, and legacies of the said testator, and that the same may be paid in a due course of administration ; and that in the mean time the said defendants, the executors, and trustees of the said testator may be restrained by the injunction of this honorable Court from receiving any further part of said testator's personal estate, or of the rents, profits, or produce of his real estate ; and that some proper person may be appointed by this honorable Court to receive and collect the outstanding personal estate of the said testator, and to receive the rents, profits, and produce of his real estate ; and that some proper person or persons may also be appointed the guardian or guardians of the plaintiffs with suitable allowances for their maintenance and education. [*And for further relief.*]

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71. *Prayer in a bill against executors and residuary legatees, the latter having raised a question of satisfaction. [Modern English Form.]*

1. That it may be declared that the aforesaid advance and settlements of the sum of £ — bank £ 3 per cent annuities, made on the marriage of the said M. C. with the said J. D. W., was not an ademption or satisfaction of the legacy of £ 30,000 like annuities given by the said will of the said testator in favor of the said M. C. and her issue, or of the residuary bequest also made by the said will in favor of the said M. C. and her issue.

2. That it may be declared, that the plaintiffs are entitled to have a sum of £ 30,000 bank £ 3 per cent annuities set apart out of the personal estate of the said testator to answer the bequest contained in the said will of £ 30,000 bank £ 3 per cent annuities in favor of the said M. C. and her issue, and that the said executors may be directed to set apart and transfer the same accordingly.

3. That it may also be declared, that the plaintiffs are entitled to have one equal eighth part of the residuary personal estate of the said testator set apart and duly invested upon and for the same trusts, interests, and purposes as are expressed by the said will of and concerning the last-mentioned sum of £ 30,000 &c.

4. That proper accounts and inquiries may, if necessary, be directed for the purpose of ascertaining the clear residue of the personal estate of the

said testator, and that one equal eighth part thereof may be set apart and invested accordingly.

5. [*For further relief.*]

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72. *Bill to obtain reimbursement out of an estate, to the children of a testator who had by his will directed certain portions of said estate to be sold for the payment of debts and legacies, but which debts and legacies had, in whole or in part, been paid out of the income of the estate, which income had been devised to said children.*

F. A., of B., in the county of S., gentleman, G. W. A., of E., in the State of I., gentleman, C. G. L., of said B., Esquire, and Cornelia, his wife, bring this their bill of complaint against J. A. L., of said B., Esquire, as he is Executor of and Trustee under the will of F. A., late of M., in the county of N., gentleman, deceased.

And thereupon the plaintiffs allege that the said F. A., late of M., aforesaid, departed this life, testate, having made a will and three codicils, copies of which are filed herewith, and which were duly admitted to Probate in said county of N., in and whereby, besides divers other provisions, he gave and devised all the rest and residue of his estates to the said J. A. L., and to H. C., G. A. G., and his son, the said F. A., in trust for the benefit of his children, the plaintiffs, the said F. A., G. W. A., and Cornelia, during their respective lives, to collect and receive the income thereof, and after deducting expenses, to divide the surplus equally between them, and upon the death of any of them to pay his or her share thereof during the life of the survivors and survivor, in such manner as the *cestui que trust* so dying should direct by will, and in default thereof as the plaintiffs understand and are advised, to the children of such *cestui que trust*, and in default thereof, to the survivors and survivor. And upon the further trust upon the decease of the last survivor to divide and distribute the trust estates in equal shares to and among all the children of the plaintiffs, share and share alike, provided always, that if the said *cestuis que trust*, or any of them, should have disposed of his or her interest in the reversion of the estates by will, such disposal should be observed and followed.

The plaintiffs further show, that the said H. C., F. A., and G. A. G. declined the said trust, and that the said J. A. L. accepted, and has since administered the same.

The plaintiffs further show that the said testator appointed the said J. A. L., H. C., F. A., and G. A. G. to be the executors of his said will, and that all of them except the said J. A. L. declined the trust, and that he accepted the same, and was duly appointed and qualified and has administered the said estate.

The plaintiffs further show, that at the time of his decease the said tes-

tator was possessed of divers real and personal estates of great value and was indebted to divers persons in large sums of money, and that in and by his said will he directed that all his just debts should be first paid, and afterwards directed the said executors, their survivors or any administrator to sell and convey a certain parcel of land, situate at the corner of H. and C. Street in said B., and another parcel situate in M. Place, near W. Street, and to apply the proceeds to the payment of his debts; and if the amount derived therefrom should not be sufficient to pay the same, then for the same purpose to sell any other real estate situate in said B. of which he should die seized.

The plaintiffs, the said F. A. and G. W. A. and the said Cornelia, further show that the personal estate of which the said testator was possessed was small in value and wholly insufficient to pay his debts and legacies, and that his real estate by reason thereof, as well as by the contents of his said will, became charged with the payment thereof — and in the usual course of administration, as well as by the express directions of the testator, should have been sold and the proceeds applied in payment thereof, and the residue held in trust during the lives of the plaintiffs, the said F. A., G. W. A., and Cornelia, and their survivors.

That at the testator's decease his debts amounted to about sixty thousand dollars, and the legacies bequeathed to seventeen thousand dollars; and that the appraised value of the estates directed to be first sold in order to obtain the means for payment thereof was, as appears by the appraisement, in the aggregate, the sum of seventy-eight thousand dollars.

The said plaintiffs further allege, that the said J. A. L., the sole acting executor and trustee, was nearly related to them, and that they had unlimited confidence in his friendship, integrity, and financial ability and discretion, and that he, as their official adviser and friend, advising with them upon the best course to be taken for their own immediate and future interests, and for the protection of the interests of those who should be entitled to the estates of the testator after their decease, was of opinion that the same could be leased to advantage, and might be expected to increase much in value; and that it would conduce to their interest and that of their children, that the same should not be sold at that time, but be leased, and that a portion of the income should be applied to the payment of the principal and interest of the debts due and chargeable upon the said estates, as well by express liens or mortgages existing thereon as by the operation of law and the will of the testator.

That the said plaintiffs, relying upon the said representations, consented thereto, and that the said J. A. L. thereupon and since has leased the said estates, and has received the income thereof, and has applied the same to the payment of the said debts and the interest thereon, until the same are quite or nearly paid and satisfied, and has also paid a part thereof to the plaintiffs.

That the representations and expectations of the said J. A. L. and the said plaintiffs have been more than realized, and that the said real estates have increased in value by a much larger degree than was anticipated, whereby the interest of those who will be entitled to the same in remainder have been very largely promoted.

That the consent of the plaintiffs to such appropriation of the income was not given for any definite time, nor was any agreement made or stipulation entered into on either side, to deprive them of their rights to have recourse to the said estates for repayment of the sums so appropriated, whenever the said estates could be sold to advantage, and that by reason of the appropriation of the said income to the payment of the debts of the said estate, they have become subrogated to the rights of the original creditors, and are entitled to have the real estates directed by the said testator to be disposed of for that purpose now sold and the proceeds applied in payment of the sums so advanced and paid out of the income to which they were entitled as equitable tenants for life, or to have such reimbursements out of the proceeds of others of the estates of the testator, which may be more advantageously disposed of.

That the said estates which the testator directed to be sold for the payment of his debts, so much thereof as is necessary for that purpose, and certain other of the estates of which he died seized, can now be sold to great advantage and for very large prices, compared to their value at the time of the decease of the testator, and that the same ought now to be sold, and the proceeds applied to the payment of any debts not already paid and satisfied, and to the payment of the sums due to them respectively, on account of the appropriation of their income to the payment of debts, the amount of which the plaintiffs are unable to set forth of their own knowledge.

That the plaintiffs have requested the said J. A. L. to cease from appropriating the income of the said real estates to the payment of the debts and legacies of the testator, and to pay it to them; and also to sell the said estates directed to be sold for the payment of debts, or so much thereof as may be necessary, and apply the proceeds to the payment of the debts and legacies remaining unpaid, and to the payment to the plaintiffs of the sums due to them as aforesaid with interest, and to render an account of all his receipts, payments, and doings, to the end that it may appear what sums of money belonging to the plaintiffs have been heretofore applied in payment of the said debts and legacies.

And the plaintiffs well hoped that the said J. A. L. would comply with such reasonable request.

But now so it is, may it please your honors, that the said J. A. L., though admitting the equitable rights of the plaintiffs, and that they are justly entitled to be reimbursed for so much of their income as has been applied to

the payment of the said debts and legacies, objects that he cannot now proceed to sell the said real estate, and to apply the proceeds, without the direction of this most honorable Court, and the protection which a decree thereof would give to him ; and sometimes that the power to sell was given to four executors, of whom only one accepted the trust, and that it is doubtful whether he has the power to sell and convey a good title ; and sometimes that as trustee he is merely a tenant for life during the lives of the said F. A., G. W. A., and Cornelia, and their survivors, without power to sell and convey a fee ; and that if he should undertake so to do, there would be difficulty and embarrassments in making a title, by which the value of the said estate would be depreciated, unless a sale thereof was made under a decree of some competent Court.

And the plaintiffs, insisting that their rights in the premises are clear and undisputable, admit that the said J. A. L. may reasonably claim the benefit and protection of a decree in the premises before proceeding to sell the said estates ; and insisting that his right to sell as executor is indisputable, inasmuch as the power, though given to four, was directed to be exercised by their survivor or whoever should administer the estate ; and also that he is duly empowered to sell as trustee, because by virtue of the duties imposed upon him as trustee he necessarily holds an estate in fee, yet admit that it would be for the interest of all concerned, and might prevent embarrassment and loss, if the said estates were sold under the order and direction of this honorable Court.

To the end, therefore, that the said J. A. L. may be ordered to render an account of all the real and personal estates received and administered by him, and of the application thereof, and of the sums of money received from the rents of said real estate and from other sources, and of the expenditure thereof, and of how much of the income thereof belonging to the plaintiffs has been applied to the payment of debts and legacies, and that he may set forth and discover what estates are now held by him as executor or trustee, and generally may make answer in the premises, and may especially set forth what was the value of the several parcels of real estate owned by the said testator at the time of his decease, and at what prices the same could now be sold, and whether any permanent improvements have been made thereon, and if so, of what nature, and to what extent and cost ; and that he may be ordered to sell the said estates directed to be sold by the testator or such other estates as may to the Court seem desirable, or so much thereof as may be necessary to pay all debts and legacies remaining unpaid, together with such sums of money with interest as may be justly due to the plaintiffs for so much of the income belonging to them as has been applied to the payment of debts and legacies, or expended for permanent improvements, and he may set forth and discover whether the plaintiffs, any or either of them, ever agreed or consented that

all of the said debts and legacies should be paid out of the said rents, without their being substituted in the place of the creditors, or to waive their rights to require the said estates to be sold whenever deemed expedient; and that the plaintiffs may have such further and other relief in the premises as the nature of the case may require; and that such order and decree may be passed as will give adequate protection to the said J. A. L., and insure a good title to any purchaser.

May it please your honors &c. [*Pray subpoena.*]

F. C. L., *Solicitor for Plaintiffs.*

[*Amory v. Lowell*, 1 Allen, 504.]

73. *Bill by administrator to have certain testamentary papers declared void for want of due execution and authentication, and to obtain the property of the deceased from the person in whose custody it was left for disposition according to said testamentary papers.*

To the Judges of the Circuit Court of the United States within and for the District of Massachusetts, sitting in Equity:

T. C. G., a subject of Her Britannic Majesty, and now her Britannic Majesty's consul at the port of B., as administrator of the goods and estate of the late Sir J. C., Baronet, intestate, brings this his bill against W. A., of the city of B., and district aforesaid, merchant, and Jacob H. H., of L., in the said district, and his wife, Julia H. H., of the said L., all of the said defendants being citizens of the Commonwealth of Massachusetts. And thereupon your orator complains and says, that Sir J. C. died at the city of B. on or about the 8th day of October, A. D. 1842, and that your orator on the 22d day of April, A. D. 1844, was duly appointed administrator of the estate of the said Sir J. C., within the Commonwealth aforesaid, and has given bonds according to law for the faithful performance of his duties as such. That on or about the 21st day of April, A. D. 1841, the said Sir J. C. assigned to the said W. A. twenty shares in the Nashua Manufacturing Company, and at the same time received from the said W. A. seven thousand dollars as an advance on account of the said shares. That on or about the same time the said Sir J. C. addressed to the said W. A. a letter of instructions with regard to the said shares, which was duly received by the said W. A., in the following words: [*Recite contents of letter.*]

That on or about the 14th day of January, A. D. 1842, the said Sir J. C. addressed to the said W. A. a letter which was duly received by the said W. A., in the following words: [*Recite contents of letter.*]

That the said letter enclosed the two following letters: [*Recite contents of letters.*]

That the last letter was sealed and indorsed as follows: "W. A., Esq., is

requested to take charge of this packet in his safe until he either sees or hears from Sir J. C., or receives authentic intelligence of his death, when Sir J. C. begs he will be so good as to open it and comply with the request therein contained. Boston, 14th February, 1842."

That at some time after the death of the said Sir J. C., the said W. A. opened the said letter and the several enclosures therein. And your orator further says, that the several sums of money, amounting in all to a large sum, to wit, three thousand dollars, which the said W. A. had in his possession at the time of the death of the said Sir J. C. and belonging to the said Sir J. C., rightly belong to your orator as administrator of his estate, and that the said W. A. is justly bound to pay the same to your orator, with interest thereon for their detention. And your orator well hoped that the said W. A. would pay the same, but the said W. A. pretends that he cannot with safety pay the same, on account of certain pretended claims made in pursuance of the letters hereinbefore recited by the said Jacob H. H. and his said wife, and also by one E. J., of Bologne, near London, in the Kingdom of Great Britain and Ireland, spinster, a person out of the jurisdiction of the Court, and on this account alone not a party to this bill, and under this pretence, though often requested, the said W. A. refuses to pay the same.

To the end, therefore, that the said W. A., Jacob H. H., and Julia H. H., and also E. J., if she shall come within the jurisdiction of the Court, may respectively full and perfect answer make upon their respective corporal oaths, according to their respective knowledge, information, and belief, to all and singular the matters and charges aforesaid, and that as fully as if the same were here repeated, and they hereto particularly interrogated. And that the said W. A. may set forth an account of all and every sum and sums of money, or of any personal estate received by him, or by any person by his order, from the said Sir J. C., and how the same have respectively been applied or disposed of, and whether any and what part of the same now remains unapplied or undisposed of, and that, upon a full and fair disclosure of the several matters aforesaid, the said W. A. may be decreed to pay to your orator the said sum of three thousand dollars with interest thereon, for the unjust detention thereof, that the said pretended claims of the said Jacob H. H. and wife, and of the said E. J., may be decreed to be without force and virtue; and that your orator may have such further relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience. May it please your honors, &c.

T. C. G.

*[Pray subpoena against W. A., J. H. H. and wife, and E. J., "if she shall come within the jurisdiction of the Court."]*

G. S. H., *Solicitor.*

*[Grattan v. Appleton, 3 Story C. C. 755.]*

## SECTION XXII.

*Bills for Partition.*<sup>1</sup>74. *Bill by coheiresses and their husbands for a partition of freehold estates.*

To &c.

Humbly complaining, show unto your honors your orators and oratrixes, T. K., of &c., and C., his wife, L. G., of —, and M., his wife, and J. V., of &c., widow, that W. S., of &c., deceased, the late father of your oratrixes, C. K., M. G., and J. V., and also G. E. F., wife of R. F., of &c., the defendants hereinafter named, was in his lifetime, and at the time of his death, seized in fee simple or of some other good estate of inheritance to him and his heirs, of and in all that messuage or dwelling-house &c., and also of and in all that other messuage &c.; all which said messuages, lands, and premises are situate, lying and being in &c., and being so seized, he, the said W. S., did many years since depart this life, intestate, leaving M. S., his wife, and your oratrixes and their sister E. F., his four daughters and only children and coheiresses him surviving; and upon his death the said messuages &c. and premises descended upon and came to your oratrixes and the said E. F., as such coheiresses, subject only to the dower of their said mother, M. S. And your orators and oratrixes further show unto your honors, that the said M. S., the widow and relict of the said W. S., departed this life some time in or about the month of —, whereupon your orators and oratrixes, T. K. and C. his wife, and L. G. and M., his wife, in right of your oratrixes, C. and M., and also your oratrix J. V. and the said R. F., and E., his wife, in right of the said E., have ever since been, and now are, severally seized in fee of and in the said messuages &c., and premises in four equal undivided parts or shares as tenants in coparcenary. And your orators and oratrixes further show, that they have frequently applied unto and requested the said R. F., and E., his wife, to join and concur with your orators and oratrixes in making a fair, just, and equal partition of the said premises between them, in order that their respective shares and proportions thereof may be allotted, held, and enjoyed in severalty. And your orators and oratrixes well hoped that the said R. F., and E. his wife, would have complied with such their reasonable requests, as in justice and equity they ought to have done. BUT NOW SO IT IS, &c., &c., they, the said defendants, absolutely refuse to comply with such your orators' and oratrixes' reasonable requests as aforesaid, pretending that your orators and oratrixes and the said defendants have ever since

<sup>1</sup> A petition for partition is in the nature of a bill in equity. *Nesmith v. Dinsmore*, 17 N. Hamp. 515.

the death of the said W. S. and M. S. respectively, their said father and mother, deceased, constantly and regularly divided the yearly rents and profits of all the said messuages &c. and premises equally between them, and that it will not be to the benefit or advantage of either of them to make an actual partition thereof. Whereas your orators and oratrixes charge, and so the truth is, that a fair, just, and equal partition of the said premises will tend greatly to the benefit and advantage of your orators and oratrixes and the said defendants, but they, the said defendants, under divers frivolous pretences, absolutely refuse to join or concur with your orators and oratrixes therein. All which actings, &c.

And that a commission of partition may be issued out of and under the seal of this honorable Court, and directed to certain commissioners therein named, to divide and allot the said messuages &c., and premises in equal fourth parts or shares; and that one full and equal fourth part or share may be allotted and conveyed unto your orator and oratrix, T. K., and C., his wife, and the heirs and assigns of your oratrix, C. K.; that one other full and equal fourth part or share may be allotted and conveyed unto your orator and oratrix L. G., and M., his wife, and the heirs and assigns of your oratrix, M. G.; and that one other full and equal fourth part or share may be allotted and conveyed unto your oratrix J. V., her heirs and assigns; and that your orators and oratrixes, T. K., and C., his wife, L. G., and M., his wife, and J. V., may severally hold and enjoy their respective allotments of the said premises according to the natures thereof in severalty; and that all proper and necessary conveyances and assurances may be executed for carrying such partition into effect &c. May it please, &c.

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### SECTION XXIII.

#### *Bills for the Appointment of New Trustees.*

75. *Bill to remove trustees, one refusing to act and the other a prisoner for debt, having applied part of the trust moneys to his own use. Prayer for an account, and for an injunction to restrain them from any further interference, — also for a reference to a master to appoint new trustees, and for a receiver.*

Humbly complaining, show unto your honors your orator and your oratrixes, J. E., of &c., and S., his wife, and S. E., the younger, spinster, the daughter and only child of your orator and oratrix, J. E., and S., his wife, that by indenture bearing date —, and made between your orator and oratrix, J. E., and S., his wife of the one part, and N. B., of &c., and

R. P., late of &c., but now a prisoner in the jail of —, the defendants hereinafter named, of the other part, after reciting that &c., [*stating the indenture,*] as by the said will to which your orator and oratrixes crave leave to refer when produced will appear. And your orator and oratrixes further show unto your honors, that the said R. P. has principally acted in the trusts of the said indenture, and has, by virtue thereof, from time to time received considerable sums of money and other effects, but the said R. P. has applied only a small part thereof upon the trusts of the said indenture, and has applied and converted the residue thereof to his own use, and in particular the said R. P. has within a few months past received a considerable sum from the estate and effects of the said C. E., the whole of which he has applied to his own use. And your orator and oratrixes further show that they have by themselves and their agents repeatedly applied to the said R. P. and N. B. for an account of the said trust property received and possessed by them, and of their application thereof. And your orator and oratrixes well hoped that the said defendants would have complied with such their reasonable requests, as in justice and equity they ought to have done. BUT NOW SO IT IS &c. And the said defendants pretend that the trust property and effects possessed and received by them were to an inconsiderable amount, and that they have duly applied the same upon the trusts of the aforesaid indenture. Whereas your orator and oratrixes charge the contrary of such pretences to be the truth, and that so it would appear if the said defendants would set forth, as they ought to do, a full and true account of all and every the said trust property and effects which they have respectively possessed and received, and of their application thereof. And your orator and oratrixes charge that the said R. P. threatens and intends to use other parts of the said trust property, and to apply the same to his own use, unless he is restrained therefrom by the injunction of this honorable Court. And your orator and oratrixes further charge that he, as well as the said N. B., ought to be removed from being trustees under the said indenture, and that some other persons ought to be appointed by this honorable Court as such trustees in their place and stead, and that in the mean time some proper person ought to be appointed to receive and collect the said trust property. All which actings &c.

And that the said defendants may answer the premises, and that an account may be taken of all and every the said trust property and effects which have, or but for the wilful default or neglect of the said defendants might have been received by them or either of them, or by any other person or persons by their or either of their order, or to their or either of their use; and also an account of their application thereof; and that the said defendants may respectively be decreed to pay what shall appear to be due from them on such account; and that the said defendants may be

removed from being trustees under the said indenture, and that it may be referred to one of the masters of this honorable Court to appoint two other persons to be the trustees under the said indenture in their place and stead, and that in the mean time some proper person may be appointed to receive and collect the said trust estate and effects, and that the said defendants may be restrained by the order and injunction of this honorable Court from any further interference therein. [*And for further relief.*] May it please, &c.

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76. *Bill for the appointment of a new trustee under a marriage settlement, in the room of one desirous to be discharged, there being no such power therein contained.*<sup>1</sup>

Humbly complaining, show unto your honors your orators and oratrixes, J. M. P., of &c., and E., his wife, and A. P. and C. P., infants under the age of twenty-one years, by the said J. M. P., their father and next friend, and S. N. M., of &c., [*the other trustees under the settlement,*] that by certain indentures of lease and release bearing date respectively &c., the release being of three parts, and made or expressed to be made between, &c. [*stating the indenture of release*]. But the said indenture of release contained no power or authority to appoint a new trustee in the place or stead of either of the said trustees therein named, who should decline to act in the said trusts, or be desirous to be removed therefrom; as in and by the said indentures &c. And your orators and oratrixes further show unto your honors, that the said intended marriage was soon afterwards had and solemnized between your orator J. M. P., and your oratrix E. P.; and that your orator and oratrix, A. P. and C. P., are the only children of the said marriage. And your orators and oratrixes further show, that the said defendant, I. P. L., declines to act in the trusts of the said indenture, and is desirous to be discharged therefrom, but by reason that no power is reserved in the said indenture for the appointment of a new trustee, your orators and oratrixes are advised that he cannot be discharged from such trusts, nor any new trustee appointed without the aid of this honorable Court. *To the end*, therefore, that the said defendant I. P. L. may upon his corporal oath, &c.

And that the said defendants may answer the premises, and that it may be referred to one of the masters of this honorable Court to appoint a new

<sup>1</sup> See *Bowditch v. Banuelos*, 1 Gray, 220. Where no trustees were named in a will, in which was a bequest of a certain sum to "the Universalist Religious Denomination in the county of Berkshire, as a permanent fund, the use to be applied annually for the support of that denomination," it was held that a Court of Equity would appoint trustees to execute the trust, on a bill filed by the organized Universalist societies of the county. *First Universalist Society in North Adams and others v. William Fitch and another, Administrators*, 8 Gray, 421.

trustee under the said marriage settlement, in the place and stead of the said defendant; and that the said defendant may be directed to join in such instrument or instruments as may be necessary for conveying or releasing the said trust premises to your orator S. N. M., and such new trustee upon the trust of the said settlement; and that thereupon the said defendant may be discharged from the trusts of the said indenture. [*And for further relief.*] May it please, &c.

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*77. Petition for discharge as trustee, and transfer of trust property to new trustee.*

To the Honorable the Justices of the Supreme Judicial Court :

Respectfully show the petition of J. I. B., of B., in the county of S., Esquire, that by force of an indenture recorded with Suffolk deeds in Lib. 627, fol. 291, he was substituted in the place and stead of E. A. B., Esquire, to be trustee under two certain indentures made by M. A. T., of said B., single woman, and recorded respectively with Suffolk deeds in Lib. 574, fol. 229, and Lib. 618, fol. 186; that as such trustee he holds certain real estate in said B., and also certain personal property upon the trusts set forth in said two original indentures, all which said indentures are herewith submitted to the Court, that after making said two original indentures, said M. A. T. intermarried with and is now wife of C. M. de los S. B., Secretary of Legation to her Catholic Majesty the Queen of Spain, and now resident at W., in the District of C.; that there is no person, to the knowledge of the petitioner, interested in said trust property and estate, except said C. M. de los S. B. and M. A., his wife; that, in the event of the death of said M. A., without children, and without having exercised the power of appointment given her by said indenture, her collateral relations, who would then be her heirs-at-law, may become interested therein; that she has now living a mother and three sisters, viz., M. M. B., wife of E. A. B., aforesaid, now residing in said B.; A. T., single woman, a member of the family of said E. A. B., and also residing in said B.; E. F. R., wife of H. G. R., junior, of B., in the State of M.; and E. T. R., being now commorant at said B., in the family of said E. A. B.; and M. S. P., a minor, wife of R. T. P., Esquire, both now absent in Europe, said R. T. P. having been late a resident in said B.; that said M. A. has requested the petitioner to transfer said trust property and estates to a new trustee, and he is desirous so to do.

Wherefore the petitioner prays the honorable Court that due notice may be ordered to all persons, and that he may be discharged from said trust, and that such order and decree may be passed as to the appointment of a new trustee, either with or without bonds for the faithful performance of

said trust, and as to the conveyance and transfer of said trust property and estates as to the Court may seem just and equitable, to the end that the petitioner, complying with and fulfilling said order and decree on his part, may be as fully and effectually released and discharged from all liability in the premises as if he had never assumed said trust. And as in duty bound will ever pray.

J. L. B.

B., April 13th, 1852.

[Bowditch v. Banuelos, 1 Gray, 220.]

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#### SECTION XXIV.

##### *Bills by Underwriters in Respect of Frauds practised upon them in the Insurance of Ships.*

78. *Bill by underwriters for a fraud practised upon them in the representation of the voyage. Prayer for an injunction to restrain the defendants from proceeding at law, and for a commission to examine witnesses abroad.*

States that W. W., of &c., alone or jointly with some other persons, was or were, or pretended to be, before and at the time of making the insurance aftermentioned, owner or owners of a certain ship or vessel called —, and they, or one of them, particularly the said W. W. or I. B. and T. G., of the city of —, insurance brokers and copartners, as agents for and in behalf of the owners or owner of the said ship, on or about —, caused a policy of insurance to be opened at the city of —, on the said ship — and her cargo, against the danger of the sea and capture of any foreign enemy, on a voyage to be performed by the said ship from the port of — to —, and which voyage, it was upon such occasion pretended, that the said ship was immediately to make, and such insurance was accordingly effected at the city of —, on or about &c., and amongst other persons who underwrote or subscribed the said policy, plaintiffs respectively underwrote the same for the sum of \$ — each at or after the premium of — per cent to return — per cent for having departed with the W. I. convoy if arrived, i. e. plaintiff I. R. the sum of \$ — upon the said ship, which was valued in the said policy at \$ —, and the rest of the plaintiffs the like sum of \$ — each, upon the cargo on board the said ship; as in and by the &c.

That notwithstanding the representations made to the plaintiffs at the time of making the aforesaid insurance, with regard to the port of the said

ship's destination, the voyage really intended to be made by her was not from the port of —, as mentioned and expressed in the said policy, but from the port of — to — or some other port in —, or to some other different port or place than —. And the plaintiffs having been deceived and imposed upon by such untrue representations of the said ship's intended voyage, the said insurance was fraudulent, and therefore the said insurance was null and void.

That the said ship afterwards sailed from the port of —, with some other ships which were to proceed under convoy for —; but the said ship — soon after quitted the said fleet and convoy, and deviated from her regular course or track of such a voyage, and proceeded to some other port or place not specified or mentioned in the said policy of insurance, particularly to the port of —, or some other port or place in —, where the said ship and her cargo were sold for a large sum of money in the whole, and which was afterwards received by the said W. W. and the other joint owners of the ship or some or one of them.

That the plaintiffs well hoped, under the circumstances aforesaid, they should not have been called upon for payment of any sums of money whatsoever on account of their having subscribed or underwrote the aforesaid policy of insurance.

But the defendants pretend that the insurance was not made fraudulently or unfairly, and that the plaintiffs were not in any manner imposed upon therein, and that the voyage actually intended to be made by the said ship — was the voyage particularly mentioned and specified in the said policy, viz. from the port of — to —, and that she never made any deviation therefrom. And they also sometimes pretend that the said ship was lost or foundered at sea in the regular course or track of the said voyage. And at other times they give out that the said ship was in the course of her voyage captured as lawful prize, and that for some or one of such reasons the plaintiffs and the several other underwriters on said policy became liable to pay the several sums insured or underwrote by them respectively on the aforesaid policy.

The plaintiffs charge the contrary, and that the plaintiffs were deceived and imposed upon in manner aforesaid respecting the port or place of the said ship's destination, for that the said ship was at the time, and upon the occasions afore-said, destined or intended for a voyage to — or some other port in —, or some other port or place in —. And the plaintiffs charge that the said ship, in the course of the said pretended voyage, separated from the rest of the ships or fleet, and made a deviation and proceeded or sailed for the port of —, or some other port or place in —, or to some other port or place different from the port or destination mentioned in the said policy, where the captain or some other persons or person on board sold and disposed of the said ship and cargo as hereinbe-

fore mentioned, and that divers remittances were afterwards made to —, on account of such sales or the produce thereof, to the said confederates the owners or some or one of them, such fraudulent insurance as aforesaid having been previously made thereon, pursuant to and in consequence of some plan or scheme concerted or contrived between the said confederates or some or one of them and the said —, the captain, or to which they, some or one of them, were or was privy, and that it was never meant, intended, or understood by and between the said confederates or any of them, that said ship should perform the voyage specified or mentioned in the aforesaid policy of insurance or proceed to —. And the plaintiffs moreover charge that the said ship was not lost, captured, or taken by the enemy, or however, not in the regular course or track of a voyage from — to —, as mentioned in the said policy of insurance. And as evidence thereof plaintiffs charge that the said captain or any other person never made any protest of the loss or capture of the said ship as is usual or customary in such cases, and which would have been made if the said ship had actually been lost or captured, nor was the said ship ever condemned, or any sentence of condemnation passed upon her as lawful prize. And as a further evidence of the aforesaid deception and imposition, plaintiffs charge that the aforesaid confederates [*the insurance brokers*], or some persons by their orders or directions, or with their privy or consent, some time in or about the month of —, wrote and sent a letter to their agent or correspondent at —, employed by them to effect the aforesaid insurance, directing him to apply to the plaintiffs or some other of the underwriters on the said policy, and to offer to cancel the said policy upon the repayment of the premiums; and such a proposition and offer was also made by the direction or with the knowledge of the said confederates [*the owners*], and in consequence of their knowledge, conviction, and belief, that the said insurance was fraudulently and unfairly made on the part of the said confederates [*the owners*], and that the underwriters on the said policy were deceived or imposed upon respecting the port of her destination, and that the said ship was not actually lost or captured, and that for such or some other reasons the said policy was null and void, and that the said confederates [*the owners*] have no just claim or demand upon the underwriters in respect of the sums insured or underwrote thereon. And plaintiffs also charge that divers letters or notes have been written by and sent to, or received by or passed between the said defendants or some or one of them, and their correspondents or agents at —, or the persons or person employed by them the said confederates, or some or one of them, in or about the making the aforesaid insurance, and the said —, the captain of the said ship, or some or one of them relating to or in some manner concerning the several matters and things hereinbefore mentioned and inquired after, particularly the making of the aforesaid insurance, and the fraud or decep-

tion practised or intended to be practised upon the plaintiffs and the underwriters of said policy, and which said letters or notes, or some copies, abstracts, or extracts thereof, or of some or one of them, together with divers other papers, memorandums, or other writings relating to the matters aforesaid, are now, or lately were, in the custody, possession, or power of them, the said confederates, or some or one of them. And the plaintiffs also charge that the truth of the several matters and things hereinbefore charged and set forth, and particularly that the plaintiffs were deceived or imposed upon in the making of the aforesaid insurance, and that the said ship was not lost or captured, and that the said confederates [*the owners*] of the said ship have no just or fair demand upon the plaintiffs by virtue of, or under the aforesaid policy, would appear in and by the said letters and papers, in case the said confederates would produce the same, but which they refuse to do, although they have been frequently applied unto for that purpose; and under such or the like pretences as aforesaid, or some others equally unjust or unreasonable, the said confederates insist on the contrary, and the said confederate W. W. has also lately commenced separate actions at law against the plaintiffs in — Court —, to recover the sums respectively underwrote by them on the said policy, and he threatens to proceed to judgment and execution thereon, well knowing that the plaintiffs are not able to make a good defence at law in the said actions, without a full disclosure and discovery of the several matters aforesaid, and without the benefit of the testimony of their witnesses who reside at — and — and other parts of —, and also in other parts and places abroad, and who could prove the truth of the several matters and things hereinbefore charged and inquired after. And the said confederates refuse to discover to the plaintiffs the names or places of abode of the other persons, whom they sometimes allege to be joint owners with them of the said ship. All which actings &c. To THE END, therefore &c.

And that the plaintiffs may have a full disclosure and discovery of the several matters and things aforesaid, and that the said defendant W. W. may be restrained, by the injunction of this honorable Court, from proceeding in the said actions already commenced by him, and that he and all the said other defendants may in like manner be restrained from commencing or prosecuting any other actions or action, or in any other manner proceeding at law against the plaintiffs or any of them touching the several matters and things aforesaid; and that the plaintiffs may have one or more commission or commissions issuing out of and under the seal of this honorable Court, for the examination of their witnesses at — and —, and other parts of —, or any other parts or places abroad as there may be occasion. [*And for further relief.*] May it please &c.

## SECTION XXV.

*To restrain Waste.*79. *To restrain waste by persons having limited interests in property.*

Your orator A. B., of &c. That your orator before and at the time of making the indenture hereinafter mentioned was seized in his demesne as of fee, of and in certain tenements, with the appurtenances, situate at L., in the county of N., hereinafter particularly described; and being so seized, by a certain indenture bearing date the — day of —, in the year —, and made between your orator of the one part, and C. D., of &c. (the defendant hereinafter named,) of the other part, your orator did demise, lease, set, and to farm let, unto the said C. D., his executors, administrators, and assigns, all &c.

To hold the same, with the appurtenances, unto the said C. D., his executors, administrators, and assigns, from the — day of —, then last past, for the term of — years thence next ensuing, at the yearly rent of \$ —; and the said C. D. did thereby for himself, his executors, administrators, and assigns, covenant, promise, and agree with your orator, his heirs and assigns, that he, the said C. D., his executors, administrators, or assigns, would during the said term keep the said premises in good repair, and manage and cultivate the said farm and lands in a proper husbandlike manner, according to the custom of the country as by the said indenture of lease, reference being thereunto had, will more fully appear. And your orator further sheweth unto your honors, that the said C. D., under and by virtue of the said indenture, entered upon the said demised premises, with the appurtenances, and became, and was possessed thereof for the said term, so to him granted thereof by your orator as aforesaid. And your orator further sheweth unto your honors, that at the time the said C. D. entered upon the said premises, the same were in good repair and condition, and your orator hoped the said C. D. would so have kept the same, and have cultivated the said lands in a proper and husbandlike manner, according to the custom of the country, and that such part of the said premises as consisted of ancient meadow or pasture ground would have remained so, and not have been ploughed up, and converted into tillage; and that no waste would have been committed on the said premises. But now so it is, may it please your honors, the said C. D., combining &c. pretends, that the said premises now are in as good repair as when he entered in or to the same, and that he has cultivated the said farm and lands in a proper and husbandlike manner, and that no waste has been committed by him thereon.

Whereas your orator charges, that the said premises and the buildings,

outhouses, gates, stiles, rails, and fences were in a good and perfect state and condition when the said C. D. entered upon the said premises, but now are very ruinous and bad, and the land very much deteriorated, from the wilful mismanagement and improper cultivation thereof by the said C. D., who has ploughed up certain fields called —, containing respectively — acres, and has otherwise committed great spoil, waste, and destruction in, upon, and about the said premises; and your orator further charges, that the said C. D. ought to put the said premises into the same condition they were in when he entered thereon, and to make your orator a reasonable compensation for the waste and damage done or occurred thereto; and that the said C. D. ought to be restrained, by the order and injunction of this honorable Court, from ploughing up the remaining pasture fields, part of the said demised premises, and particularly the fields called — and —, and containing respectively — acres, which he threatens to do, and also restrained from committing any further or other waste, spoil, or destruction, in and about or to the said estate and premises, or any part thereof. All which actings, &c.

And that the said C. D. may be compelled by the decree of this honorable Court to put the said premises into such repair and condition, in every respect, as far as circumstances will permit, as the same were in when he entered upon the same, under and by virtue of such demise as aforesaid; and may also be decreed to make a reasonable compensation to your orator for all waste done, committed, or suffered by him on the said premises, and all damage occasioned thereto by his mismanagement or neglect, (your orator hereby waiving all pains and penalties incurred by the said C. D. on account of committing waste on the said premises,) and that he may be decreed to keep the said premises in good and sufficient repair and condition, during the remainder of his interest therein, and to manage and cultivate the said farm and lands in a proper and husbandlike manner, according to the custom of the country, and that he may be likewise restrained, by the order and injunction of this honorable Court, from ploughing up the said remaining pasture fields, forming part of the said demised premises, and particularly the said fields called — and —, and from committing or permitting any further waste or spoil in, on, or to the said demised premises, or any part thereof. [*And for general relief.*] May it please, &c. [*End by praying an injunction in the terms of the prayer, and by praying process of a subpoena, as in forms Nos. 38, 40, ante, pp. 1906, 1907.*]

## SECTION XXVI.

*To prevent the Creation of a Nuisance where irreparable injury to an individual would ensue.*

*80. Bill for an injunction to prevent the obstruction of ancient windows.*

That your orator A. B. now is, and for a considerable time past has been, possessed of a certain messuage or dwelling-house, with the appurtenances, situate at D., in the county of C., in which, for twenty years last past, there has been, and still of right ought to be, two ancient windows to admit of light and air, for the convenient and wholesome use, occupation, and enjoyment of the said house. And your orator further sheweth unto your honors, that G. H., of &c. (the defendant hereinafter named) is possessed of a piece or parcel of land adjoining or contiguous to that part of your orator's said house wherein are such windows as aforesaid; and the said C. D. has lately begun to dig the foundation for a certain wall or building in that part of the said piece of ground which is immediately opposite, and is within the space or distance of four feet only from such part of your orator's said house as aforesaid; and the said G. H. has already erected, or caused to be erected, part of such intended wall or building of considerable height, and exceeding the height of twenty feet, which has greatly darkened your orator's said dwelling-house and the appurtenances, and prevented the light and air entering your orator's said house through the said windows, and rendered the same close, uncomfortable, and unwholesome, and unfit for the habitation of your orator. And your orator further sheweth unto your honors, that, in consequence of such proceeding on the part of the said G. H. as aforesaid, your orator, in or as of last — term, brought an action on the case in &c., which has since been tried, and a verdict obtained for your orator, for the sum of \$——, for the damages sustained by your orator by the erection of such wall or building as aforesaid.

And your orator further sheweth, that your orator, both previously to, and since the determination of such action as aforesaid, frequently by himself and otherwise applied to the said G. H., and requested him not only to desist from continuing to erect, but also to take down and abate such wall or building, and nuisance, so as to prevent your orator being so injured thereby as aforesaid, which your orator hoped would have been done. But now so it is, may it please &c., the said G. H., combining &c. still proceeds in the erection of the said wall or building, and he pretends that, as an absolute owner of the said piece of ground, he has good right to erect the said wall or building on any part thereof, without any interruption or prevention by or on the part of your orator; and he also pretends

that the said wall or building is erected on an ancient foundation, and therefore, notwithstanding it may obstruct your orator in the free enjoyment of the light and air, which was admitted through your orator's said windows, that he is legally entitled so to do. Whereas your orator charges the contrary thereof to be true, and that the said G. H. is only entitled to exercise such acts of ownership in and upon the said piece of ground as are legal and proper, and not to erect a wall or building so near to your orator's messuage and dwelling-house as to obstruct his ancient windows, and become a nuisance to your orator; and that even if the said wall or building be erected on an ancient foundation, but which your orator nowise admits, yet the said premises being far distant from L., no right or privilege, to the injury or prejudice of your orator, by reason thereof, attaches to the said G. H., as such owner of the said piece of ground as aforesaid. And your orator further charges, that from the slight and perishable materials of which the said wall or building is composed, the same is in great and constant danger of falling and doing considerable injury to your orator, as the said G. H. well knows, but nevertheless he persists in his intention of continuing such erection, which will render the said wall or building much more injurious and dangerous to your orator than the same now is, unless he shall be restrained therefrom by the order and injunction of this honorable Court. And that the said G. H. may make a full and true disclosure and discovery of and concerning the several matters aforesaid; and that the said G. H. may be restrained, by the order and injunction of this honorable Court, from proceeding in the erection of the said wall or building; and that he may be decreed to obviate and abate the said nuisance, so as to render your orator's enjoyment of his said dwelling-house, with the appurtenances, as safe, wholesome, and fit for your orator's habitation as the same was previously to the commencement of the erection of such wall or building as aforesaid. [*And for general relief.*] May it please, &c. [*End with praying an injunction in the terms of the prayer, and praying process, &c.*]

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#### SECTION XXVII.

##### *A Bill quia timet.*

81. *Bill by a surety to compel the debtor on a bond in which he has joined to pay the debt incurred by breach of covenant.*

Your orator A. B., of &c. That your orator, at the special instance and request of C. D. of &c. (one of the defendants hereinafter named) joined with the said C. D. in a certain bond or writing obligatory, bearing date

the — day of —, whereby your orator and the said C. D. respectively acknowledge themselves to be jointly and severally held and bound to E. F., of &c. (the other defendant hereinafter named) in the penal sum of \$ —, subject to a condition thereunder written, that if the said C. D. should well and truly observe, perform, fulfil, and keep, all and every the covenants whatsoever, which, on the part of the said C. D. ought to be observed, fulfilled and performed, and which were contained in a certain indenture, bearing even date with the said writing obligatory, and made between the said C. D. of the one part, and the said E. F. of the other part, according to the true intent and meaning of the said indenture, then the said bond or obligation should be void. And your orator further sheweth unto your honor, that the said indenture in the said writing obligatory mentioned, and which bore even date therewith, was made between the said E. F. of the one part, and the said C. D. of the other part; and the said E. F. did thereby demise, lease, set, and to farm let, unto the said C. D., his executors, administrators, and assigns, all that messuages, &c. [*Here state the subject of the demise.*] To hold the same, with the appurtenances, unto the said C. D., his executors, administrators, and assigns, from the — day of —, then last past, to the full end and term of — years thence next ensuing, and fully to be complete and ended; yielding and paying therefor, yearly, and every year, unto the said E. F., his heirs and assigns, the clear yearly rent or sum of \$ —, payable on the first day of January in each year. And the said C. D. did, in and by the said indenture, for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said E. F., his heirs and assigns, (amongst other things) in manner following; that is to say, that from and after the said messuage &c. &c. should have been put in good and tenantable repair, by and at the expense of the said E. F., his heirs or assigns, he the said C. D., his executors, administrators, and assigns, should and would, during the said continuance of the said demise, at his and their own costs and charges, support, uphold, and keep the said messuage &c. &c., in good and tenantable repair, order, and condition, and so leave the same at the expiration, or other sooner determination of the said term, as by the said indenture, reference being thereunto had, will appear. And your orator further sheweth unto your honors, that the said C. D., under and by virtue of the said indenture, entered into and upon the said demised premises, and became and was possessed thereof for the term so granted to him as aforesaid, and the said E. F. put the said messuage &c. &c., into good and tenantable repair at his own expense; and your orator therefore hoped that the same would have been so kept by the said C. D. during the continuance of the said demise, and left by him at the expiration thereof; and that he would have performed all the other covenants in the said indenture contained, and by and

on the lessee's part and behalf to be kept done and performed, and have freed and discharged your orator from all liability in respect of the said bond. But now so it is, may it please your honors, the said C. D., acting in concert with the said E. F., and combining &c., has not, as is alleged by the said E. F., kept and left the said messuage &c. &c., in good and sufficient tenantable repair, according to his said covenant, and the said E. F., therefore threatens and intends to proceed against your orator, on the said bond, for the amount of the damages which he alleges he has sustained by breach of such covenant by the said C. D. as aforesaid; and the said C. D., although often requested by your orator so to do, refuses to protect and indemnify your orator against any loss or liability which your orator may sustain or be put unto by joining in such bond as aforesaid.

And that the said C. D. may be decreed by this honorable Court forthwith to pay and satisfy the said E. F. any demand which he may have against your orator as co-obligor with the said C. D. in such bond as aforesaid, on account of the breach for non-performance of the said covenant, or of the several other covenants contained in the said indenture of demise, on the part and behalf of the lessee to be kept, done, and performed, or any of them, or otherwise howsoever, under and by virtue of the said bond; and that your orator may be indemnified and discharged by the said C. D. from all loss and liability whatsoever in respect thereof. [*And for general relief.*] May it please your &c. [*End by praying subpoena against the said C. D. & E. F.*]

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*Statements. (English.)*

82. *Where a joint-stock banking company are suing.*] In and previously to the year 1844, the London and Westminster Bank was, and has since continued to be, and still is, a Joint-Stock Banking Company, composed of more than six persons, carrying on business at Lothbury, in the City of London, and at —, and other places, in the county of Middlesex, and the plaintiff is one of the members and duly registered officer of the said Banking Company, and as such is able to sue and be sued under the provisions of the statute in that case made and provided.

83. *In a case of a Joint-Stock Banking Company, where their public officer is made a defendant.*] The London and County Bank is a Joint-Stock Banking Company duly registered, and the defendant is the public officer thereof, who is entitled to sue and be sued in respect of all transactions in which the said Banking Company is concerned.

84. *Where deeds not in plaintiff's possession.*] The plaintiff has not

nor ever had in his possession or power the conveyances and other assurances by which &c., but the same are now in the possession or power of A. S., or some other of the defendants hereto, and therefore the plaintiff cannot set forth the particulars of such conveyances and other assurances more perfectly than is hereinbefore mentioned, but he claims leave to refer thereto when the same shall be produced.

85. *Where defendant out of jurisdiction.*] The said — is now residing in parts beyond the seas, out of the jurisdiction of this honorable Court, that is to say, at —, in the Kingdom of —.<sup>1</sup>

86. *Accumulation of funds.*] And they the said defendants — [*the executors*], from time to time laid out and invested such rents and profits in the purchase of government stocks, in their names, upon the trust and according to the directions of the said will, and they again laid out and invested the dividends and interest of such stock in the purchase of like stock in their names, by way of accumulation, in the manner directed by the said will.

87. *Allegation in bill by assignor of debt against debtor.*] The said indenture of assignment does not contain any power authorizing the plaintiff to use the name of the defendant in any action or proceedings at law for the recovery of the said debt of \$ —, so due and owing from the said —, and the defendant refuses to permit the plaintiff to use his name in the action against the said —, for the recovery of the said debt of \$ —, and the defendant, acting in collusion with the said —, threatens and intends to receive the said debt from the said —, and to release him therefrom.<sup>2</sup>

88. *Prayer for transferring fund from the credit of one cause to that of another.*] That the Accountant-General of this honorable Court may be ordered to transfer the said £ — Bank £ 3 per cent annuities, and the said sum of £ — cash, now standing in his name in the books of the Governor and Company of the Bank of England, in trust in the said cause "S. v. B.," and all dividends which may accrue thereon previously to such transfer, from the said cause of "S. v. B." into this cause, and that the same may be duly administered in this cause, and be paid to or secured for the benefit of the parties entitled thereto.

<sup>1</sup> If a defendant out of the jurisdiction is served with a bill, he must also be served with the subsequent proceedings, as if he were within the jurisdiction. *Lanham v. Pirie*, 2 Jur. N. S. 1201, V. C. S.

<sup>2</sup> The assignee of a debt cannot, unless some impediment exists in the way of his recovering his debt at law by using the creditor's name, maintain a suit in equity. *Hammond v. Messenger*, 9 Sim. 327; *Rose v. Clarke*, 1 Y. & C. C. C. 534; *Sewell v. Maxsy*, 2 Sim. N. S. 189; *Clark v. Cort*, 1 Cr. & Ph. 154.

## CHAPTER III.

## ORIGINAL BILLS NOT PRAYING RELIEF.

## SECTION XXVIII.

## 1.

*Bill to perpetuate Testimony.*89. *Bill to perpetuate the testimony of witnesses to a will.*

Humbly complaining, sheweth unto your honors your orator, A. B., of &c., that C. D., late of &c., deceased, before and at the time of making his will hereinafter mentioned, was seized in fee of and in, divers freehold estates, which are hereinafter more fully mentioned and described; and the said C. D. being so seized as aforesaid, and being of sound and disposing mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the — day of —, signed by him, the said C. D., and subscribed and attested according to law; and which said will, with the attestation thereof, is in the words and figures following, that is to say: [*set out the will and the attestation verbatim*], as by the said will and the attestation clause thereof, reference being thereto had, will appear.

And your orator further sheweth unto your honors, that the said C. D. departed this life on or about the — day of —, without having revoked or altered his said will, leaving his brother E. D., of &c., the defendant hereinafter named, his heir-at-law; and upon the death of the said testator, your orator, under and by virtue of the said will, entered upon and took possession of all the said freehold estates thereby devised to your orator for life, and your orator is now in possession thereof. And your orator hoped that no disputes would have arisen respecting the devises contained in the said will, or the validity thereof. BUT NOW SO IT IS &c., the said E. D. pretends that the said will is void and ineffectual; and although he will not dispute the validity thereof during the lives of the subscribing witnesses thereto, yet he threatens and intends to do so when they are dead, so that your orator may be deprived of their testimony.

And your orator further sheweth, that all of the said subscribing witnesses are upwards of seventy years of age and in feeble health [*or are about to depart from the Commonwealth or State*], and that your orator fears the testimony of the said witnesses may be lost by their death [*or departure from the Commonwealth or State*] before the cause can be investigated in a Court of law.

In consideration whereof &c.; and that your orator may be at liberty to have the several subscribing witnesses to said will examined, and that your orator, if necessary, may have a commission or commissions for the examination of the said subscribing witnesses to the said will, to the end that their testimony may be preserved and perpetuated; and that your orator may be at liberty to read and make use of the same on all future occasions, as he shall be advised. May it please your honors, &c.

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SECTION XXIX.

2.

*Bill for Discovery.*

90. *Bill for discovery in aid of an action at law; the defendant having pleaded a set-off, and inserted items in the particular of such set-off which ought not to have been charged against the plaintiffs, being trustees under the deed of trust executed by two partners in trade for the benefit of their creditors.*

Humbly complaining, show unto your honors your orator, P. M., of &c., J. A., of &c., and J. R., of &c., that by an indenture of assignment bearing date —, and made between J. G. and J. W., therein described, of &c., of the first part, the several persons who had thereunto set their hands and affixed their seals, creditors of the said J. G. and J. W., as copartners as aforesaid, or of the said J. G. on his own separate account, of the second part, and your orators of the third part, they the said J. G. and J. W., (amongst other things) bargained &c. [*setting out that part showing the assignment to the plaintiffs, and particularly the clause which gives them power to sue*], as in and by, &c. And your orators further show unto your honors, that at the time of the execution of the said indenture there was justly due and owing to the said J. G. and J. W., on their partnership account, from R. K., of &c. (the defendant hereinafter named), the sum of \$ —, being the balance of an account between the said J. G. and J. W., the particulars whereof are set forth in the schedule hereto. And your orators further show that they have repeatedly applied to the said R. K. to pay to them as such trustees as aforesaid the said sum of \$ —, with which just and reasonable requests your orators well hoped the said defendant would have complied, as in justice and equity he ought to have done.

BUT NOW SO IT IS, &c., he has absolutely refused so to do; and your orators have therefore been compelled to commence an action in the names

of the said J. G. and J. W., against the said defendant to compel the payment of the said balance; and your orators charge that the said defendant has pleaded a set-off in the said action, and has delivered a particular of such set-off, which, as far as it extends, to the date of the said assignment to your orators, corresponds in substance with the creditor side of the account set forth in the schedule hereto; but the said defendant had added thereto three articles for copper delivered in the year —, for which he claims credit in the said action. Whereas your orators charge that the said defendant at or about the time of the execution of the said assignment to your orators was apprized thereof, or had some reason to know, believe, or suspect, and did know, believe, or suspect that the said J. G. and J. W. had made such assignment, or some assignment of their copartnership property to your orators or to some trustees for the benefit of their creditors. And your orators further charge that the said copper was delivered at —, which had belonged to the said J. G. and J. W., and had been comprised in the said assignment to your orators, and had been afterwards sold by your orators to the said J. G.; and the said J. G. applied to the said defendant to purchase the said copper on his the said defendant's credit, or to guaranty the payment for the said copper to the person from whom it was bought, by reason that the circumstances of the assignment to your orators being known, the said J. G. could not obtain credit for the said copper in his own name alone; and the said defendant for that reason lent his credit to the said J. G. for the purchase of the said copper, or guarantied the payment thereof, trusting to the personal responsibility of the said J. G. And your orators further charge that the said defendant has also added to his said particular of set-off a sum of \$ —, for a year and a half's wages for one J. B. C. Whereas your orators charge that the said defendant has no just right to any such demand against your orators as trustees under said assignment; and the said defendant refuses to set forth how he makes out such his claim, and when and up to what time he computes the said wages. And your orators charge that they are advised that they cannot safely proceed in the said action so commenced by them as aforesaid in the names of the said J. G. and J. W., without a discovery of the circumstances hereinbefore stated from the said defendant. **TO THE END, therefore, &c.**

And that the said defendant may set forth how he makes out such his said claim, and when and up to what time he computes the said wages, and whether your orators can safely proceed in the said action so commenced by them as aforesaid, in the names of the said J. G. and J. W., without a discovery of the circumstances hereinbefore stated from the said defendant. And that the said defendant may make a full and true discovery of all and every the matters aforesaid; May it please, &c.

*[Pray subpoena against R. K.]*

91. *Bill of discovery and prayer. [Modern English Form.]*

*Allegation or charge.*] That the plaintiff is unable safely to defend the action [*or suit*] which has been so commenced [*or instituted*] and is now pending in the said Court of — [or in this honorable Court], without a full discovery from the said defendant of all and singular the matters and things hereinbefore stated.<sup>1</sup>

*Prayer.*

That the defendant may make a full and true discovery and disclosure of and concerning the matters hereinbefore stated.<sup>2</sup>

## CHAPTER IV.

## BILLS NOT ORIGINAL.

## SECTION XXX.

## 1.

*Supplemental Bills.*<sup>3</sup>92. *Supplemental bill against the assignee of a bankrupt defendant.*

Humbly complaining, show unto your honors your orators, A. B. and C. D., of —, that your orators did, in or as of — Term — exhibit their original bill of complaint in this honorable Court against B. L., of &c., praying that an account might be taken of the personal estate, effects, &c. And your orators further show that the said defendant, having been served with

<sup>1</sup> A person filing a bill of discovery is bound to state the purpose for which he wants discovery. *Heming v. Dingwall*, 2 Ph. 212, 214.

<sup>2</sup> This is the prayer, where no relief is sought, but merely a discovery from the defendant.

The powers which courts of law, as well as equity, now generally possess, under recent statutes, of obtaining discovery from parties to actions and suits, have rendered bills of discovery of rare occurrence, but there may be occasions in which it would be expedient to file such a bill. *Lovell v. Galloway*, 19 Beav. 1.

The jurisdiction of courts of law, to obtain discovery under late English statutes, is not limited to matters respecting which a discovery can be obtained in a court of equity. *Osborn v. London Dock Co.*, 1 Jur. N. S. 93; *Martin v. Heming*, 10 Exch. 478.

The words, "*that such other order may be made upon the defendants as the nature of the case may require*," do not convert a bill of discovery into a bill for relief. *Southeastern Railway Co. v. The Submarine Telegraph Co.*, 18 Beav. 427; 17 Jur. 1044.

<sup>3</sup> The occasions for the use of supplemental bills are very much limited in England by late acts of Parliament and rules of Court. See ante, Vol. II. p. 1589 *et seq.*

process to appear, appeared accordingly and put in his answer to the said bill, and your orators replied to the said answer, but before any further proceedings were had in the said cause, and on or about the —— day of ——, a commission of bankrupt —— was awarded and issued against the said B. L., who has been thereupon duly found and declared bankrupt; and E. D., of ——, the defendant hereinafter named, having been since duly chosen assignee of the estate and effects of the said bankrupt, all the estate and effects late of the said bankrupt have been duly conveyed and assigned to the said E. D. And therefore your orator is advised that he is entitled to the same relief against the said E. D. as he would have been entitled to against the said B. L. if he had not become bankrupt. To THE END, therefore, &c.

And that your orator may have the full benefit of the said suit and proceedings therein against the said E. D., and may have the same relief against him as your orators might or could have had against the said B. L. in case he had not become bankrupt; or that your orators may have such further or other relief in the premises as to your honors shall seem meet. May it please, &c.

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93. *Supplemental Bill in a patent cause, stating the fact of an extension since the filing of the original bill.*

To the Judges of the Circuit Court of the United States, for the District of Massachusetts.

*In Equity.*

E. H., Jr., of B., in the State of N. Y., and a citizen of the State of N. Y., brings his supplemental bill against C. W. W., of said Massachusetts.

And thereupon your orator complains and says, that he filed his original bill against the defendants in this Court, August 9th, 1859, wherein he prayed for a discovery, account, payment of profits, and an injunction to restrain the said defendants from infringing your orator's patent, granted to him by the United States of America, for improvement in sewing machines, dated September 10th, 1846; and for other relief, as stated in his said original bill.

And your orator further shows, that since the filing of his said original bill, namely, on the eighth day of September, in the year eighteen hundred and sixty, upon the application of your orator, and after due proceedings had in all respects as required by law, the Commissioner of Patents granted the extension of said patent for the term of seven years from and after the expiration of the first term thereof, viz. the tenth day of September, 1860, and made a certificate of such extension thereon, and entered the same on record in the Patent Office in due form of law;

and thereupon the said patent was renewed and extended, and now has the same effect in law as though it had been originally granted for the term of twenty-one years, as in and by said certificate or a certified copy thereof here in Court to be produced, will more fully appear. Yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right and in violation of said letters patent and your orator's exclusive rights, secured to him as aforesaid, from September 1st, 1857, has made, used, or vended, and still does make, use, or vend to others to be used in said district and in other parts of the United States, a large number of sewing machines, but how many your orator cannot state, but prays that the defendant may discover and set forth, each embracing substantially the improvement in sewing machines, or a material part thereof, patented by your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein and in his said original bill prayed; and may, under oath and according to his best and utmost knowledge, remembrance, information, or belief, full, true, direct, and perfect answer make to all and singular the premises, and more especially, may answer, discover, and set forth, whether during any and what period of time since September 1st, 1857, and where he has made, used, or vended to others to be used; for any and what consideration, any, and how many sewing machines; and whether or not the same embraced the said improvement in sewing machines, or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using, or vending of sewing machines, embracing said improvement patented to and vested in your orator as aforesaid; and may be restrained, by an injunction to be issued out of this honorable Court, or by one of your honors, according to law in such case provided, from making, using, or vending any sewing machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines, now in possession or under the control of the defendant, may be delivered up to your orator or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet;

May it please your honors, &c.

E. H., JR.

J. G., *for Plaintiff.*

94. *Second Supplemental Bill in a patent cause, stating that since the filing the first Supplemental Bill, the patent had been surrendered, &c., and a new patent issued.*

To the Judges of the Circuit Court of the United States, for the District of Massachusetts :

*In Equity.*

E. H., Jr., of B., in the State of N. Y., and a citizen of the State of N. Y., brings this his second supplemental bill against C. W. W., of B., in the district of Massachusetts, sewing machine maker, and a citizen of the State of Massachusetts.

And thereupon your orator complains and says, that he filed his original bill against the said defendant, in this Court, August 9th, 1859, and his first supplemental bill, November 5th, 1860 ; wherein he prayed for a discovery, account, payment of profits, and an injunction to restrain the said defendant from infringing your orator's patent, granted to him by the United States of America, for improvement in sewing machines, dated September 10th, 1846 ; and for other relief, as stated in his original and supplemental bill.

And your orator further shows, that since the filing of his said original bill, namely, on the eighth day of September, in the year eighteen hundred and sixty, upon the application of your orator, and after due proceedings had in all respects as required by law, the Commissioner of Patents granted the extension of said patent for the term of seven years from and after the expiration of the first term, viz. the tenth day of September, 1860, and made a certificate of such extension thereon, and entered the same on record in the Patent Office in due form of law, and thereupon the said patent was renewed and extended, and now has the same effect in law as though it had been originally granted for the term of twenty-one years, as in and by said certificate, or certified copy thereof, here in Court to be produced, will more fully appear, and thereupon his first supplemental bill was filed as aforesaid.

And your orator further shows, that since the filing of his said first supplemental bill, namely, on the nineteenth day of March, in the year eighteen hundred and sixty-one, his aforesaid patent having been surrendered and cancelled on account of a defective specification, a new patent was duly issued to him for the same invention, in accordance with his corrected description and specification, whereby was granted and secured to your orator, his heirs, administrators, or assigns, for said term of twenty-one years from September 10th, 1846, the full and exclusive right and liberty of making, constructing, using, and vending to others

to be used, the said improvement in sewing machines therein specified and claimed, as in and by said reissued letters patent, or a certified copy thereof, here in Court to be produced, will more fully appear.

And your orator further shows, that since the extension of his said patent, he has himself become a manufacturer of sewing machines, and has licensed many other parties to manufacture and sell sewing machines, embracing his said patented invention; and that your orator and his licensees have made very large investments for the purpose of fully supplying the market with the best sewing machines, and that the continued infringements of your orator's said patent, committed by the defendant, has caused and is still causing irreparable injury to your orator's said rights and business, and to the investments and business of your orator's licensees under his said patent; yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right, and in violation of said letters patent, and your orator's exclusive rights, secured to him as aforesaid, has continued since the reissue aforesaid, as well as up to that time, to make and vend, and still does make and vend to others to be used in said district and in other parts of the United States, a large number of sewing machines, but how many your orator cannot state, but prays that the defendant may discover and set forth each, embracing substantially the improvement in sewing machines, or a material part thereof, patented to your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein and in his said original bill prayed, and may, under oath, and according to his best and utmost knowledge, remembrance, information, or belief, full, true, direct, and perfect answer make to all and singular the premises, and more especially may answer, discover, and set forth, whether during any and what period of time, since September 1st, 1857, and where, he has made, used, or vended to others to be used, for any and what consideration, any, and how many, sewing machines, and whether or not the same embraced the said improvement in sewing machines or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using, or vending of sewing machines embracing said improvement patented to and vested in your orator as aforesaid; and may be restrained, by an injunction to be issued out of this honorable Court, or by one of your honors, according to law in such case

provided, from making, using, or vending any sewing machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines, now in the possession or under the control of the defendant, may be delivered up to your orator or be destroyed ; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet ;

May it please your honor, &c.

E. H., JR.

B. R. C., of Counsel with Plaintiff.

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95. *Supplemental bill after a hearing before a single justice, and reservation for the full court, to bring forward the fact of the termination of the partnership concerning which the original bill was brought.*

To the Honorable the Justices of the Supreme Judicial Court :

Humbly complaining, sheweth unto your honors your oratrix, A. M. K., of N., in the county of M., widow of D. M. K., late of said N., merchant ; that your oratrix did, on or about the twenty-first day of May, A. D. 1861, exhibit her original bill of complaint against W. B., of B., in the county of S., Esquire, G. G., of said N., Esquire, A. Moncrief K., and D. Malcolm K., also of said N., and minor children of your oratrix and the said D. M. K., wherein your oratrix prayed that the said defendants, W. B. and G. G., and said minor children, A. Moncrief K., and D. Malcolm K., by a guardian for this suit, which your oratrix prayed the honorable Court to appoint, might, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the premises, as fully in every respect as if the same were there repeated, and they thereunto particularly interrogated, according to the best of their respective knowledge, information, and belief ; and that it might be determined by the judgment of this honorable Court, whether, under the will of the said D. M. K., the share of the net profits of the business of the firm of H., B. & T. belonging to the estate of the said D. M. K. was, and was to be taken, as part of the income, or as part of the principal fund of the residue of the estate of said D. M. K. ; and that if it should appear that such share of the net profits of said partnership business constituted and formed a part of the income of said residue, the aforesaid defendants, W. B. and G. G., executors and trustees under said will, and their successors in said trust, might be ordered and decreed to account with your oratrix for the profits of said partnership business, and to pay over to your oratrix such a proportion thereof as she was entitled to, under the provisions of the will of said D. M. K. ; and that your oratrix might have such other and further relief as the nature of her case might require ; and

that a writ of subpoena might be directed to the said defendants, commanding them, and every of them, to appear before your honors in this honorable Court, then and there to answer to all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors should seem meet.

And your oratrix further sheweth, that, in accordance with the prayer of her bill, a guardian was duly appointed for the said minor children, A. Moncrief K. and D. Malcolm K., to wit: H. D., Esquire, Counsellor at Law, and that said defendants having been served with process to appear, appeared accordingly, and put in their answers to the said bill of complaint, and thereupon the whole cause was set down for hearing upon the bill and answers; and thereafter, to wit: upon the third day of December, A. D. 1861, the same was heard before one of the Justices of this Court, the Honorable E. R. H., and was by said Justice reserved for the whole [full] Court; all of which, the foregoing, by the said bill and answers, and orders and decrees now remaining as of record in this honorable Court fully appears.

And your oratrix further sheweth, by way of supplement, that since the filing of the said original bill, and since the putting in of the answers, and the making of the several orders and decrees aforementioned, to wit, on the fourth day of September now current, the aforesaid limited partnership theretofore existing, under the name and firm of H., B. & T., has been dissolved and terminated, in accordance with the provisions of the written contract of partnership between the said H., B. & T. of the first part, and the said D. M. K. of the second part, bearing date of the fourth day of September, A. D. 1858, as by reference to a copy of said contract hereto annexed, and made a part hereof, more fully appears. And your oratrix avers, that the said executors and trustees have received from said partnership business, as the share of the net profits thereof, belonging to the estate of the said D. M. K., a very large sum of money, to wit, eighty thousand dollars or thereabouts.

To the end, therefore, that the said defendants, W. B., G. G., and the said minor children, A. Moncrief K., and D. Malcolm K., by their said guardian, H. D., may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the premises, as fully, in every respect, as if the same were here repeated, and they thereunto particularly interrogated, according to the best of their respective knowledge, information, and belief; and that your oratrix may have the full benefit of her said suit and proceedings therein, against the above-named defendants, and may have the same relief against said defendants as your oratrix might or could have had in case her original bill of complaint had been filed after the termination and dissolution of the limited partnership of H., B. & T., and after the receipt, by said trustees, of said sum of eighty thousand dollars;

and that your oratrix may have such other and further relief in the premises as to your honors shall seem meet. May it please your honors to grant unto your oratrix a writ of subpoena, to be directed to the said W. B., G. G., and H. D., thereby commanding them, and every of them, at a certain day, and under a certain penalty therein to be specified, personally to appear before your honors in this honorable Court, and then and there to answer all and singular the premises, and to stand to, perform, and abide by such order and decree therein, as to your honors shall seem meet; and your oratrix will ever pray.

A. M. K.

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96. *Supplemental bill to an original and amended bill filed by a lessee for the specific performance of an agreement to grant a further lease, stating that the defendant has brought an ejectment against the plaintiff, and praying an injunction to restrain his proceeding at law.*<sup>1</sup>

Humbly complaining, sheweth unto your honors your orator, J. K., of &c., that in or as of — Term —, your orator exhibited his original bill of complaint in this honorable Court against H. B. S., and which said bill has been amended by order of this honorable Court, thereby praying that the said defendant might be decreed specifically to perform his agreement with your orator, touching the lease of the farm and premises in the said bill mentioned, and to grant your orator a lease thereof for — years, commencing from the expiration of his former lease, at the yearly rent of \$ —, your orator being ready and willing to do and perform everything on his part required to be done and performed in pursuance of the said agreement. And your orator further sheweth, that the said defendant appeared and put in his answer to the said original bill; as by the said bill and answer now remaining as of record in this honorable Court, reference being thereto had, will appear. And your orator further sheweth, by way of supplement, that since the filing of the said original bill the said defendant has caused an action of ejectment to be commenced in the — Court —, for the purpose of turning your orator out of possession of the said farm and premises, and the said action is still depending in the said Court. And your orator being advised that the said defendant cannot support such action, and that your orator is entitled to a specific performance of the said agreement as prayed by his said amended bill, he has by himself and his agents several times applied to and requested the said defendant to desist from proceeding in the said action, and he was in hopes that he would have complied with such fair and reasonable requests, as in justice and equity he ought to have done. BUT NOW SO IT IS, &c., the said H. B. S. refuses

<sup>1</sup> See ante, Vol. II. p. 1589 *et seq.*

&c., and insists upon proceeding in his said action, and to turn your orator out of possession of the said farm and lands, to the manifest wrong and injury of your orator in the premises. TO THE END, therefore, &c.

And that the said defendant may be restrained by the injunction of this honorable Court from proceeding in the said action, and from commencing any other action or proceeding at law for the purpose of turning your orator out of possession of the said farm and lands. May it please, &c.

[*Pray subpoena and injunction against H. B. S.*]

A. C.

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### SECTION XXXI.

#### *Bills of Revivor.*<sup>1</sup>

97. *Bill of revivor (before decree) by the administrator of the plaintiff in the original suit, the executors in his will having renounced probate.*

Humbly complaining, sheweth unto your honors, your orator C. D., of &c., that J. A., late of &c., but now deceased, on or about —, exhibited his original bill of complaint in this honorable Court against G. T. W., of &c., as the defendant thereto, thereby stating, &c., praying, &c. [*here state the prayer*]. And your orator further sheweth unto your honors, that the said defendant, having been duly served with process for that purpose, appeared and put in his answer to said bill, as in and by the said original bill, &c. And your orator further sheweth, that some proceedings have been had before —, one of the masters of this Court, to whom this cause stands referred, but no general report has yet been made in the said cause; and that the said J. A. lately and on or about the — day of —, departed this life, having first made and published his last will and testament in writing, bearing date the — day of —, and a codicil thereto, bearing date the — day of —, and thereby appointed M. C. and W. W. executors thereof. And your orator further sheweth, that the said M. C. and W. W. have renounced probate of the said will and codicil of the said J. A. deceased, and decline to act in the trusts thereof, and that your orator has obtained letters of administration with the will annexed of the goods, chattels, rights, and credits of the said J. A. deceased, to be granted to

<sup>1</sup> The necessity for bills of revivor is obviated to a considerable extent in England by the late acts of Parliament and orders in Chancery, providing a simpler mode of bringing cases abated again before the Court. See ante, Vol. II. p. 1589 *et seq.* Other modes of revivor are provided in Massachusetts, 7th Rule of Chancery; in Maine, 21st Rule of Chancery; in New Hampshire, 28th Rule in Chancery.

him by and out of the proper Court, and has thereby become and now is his legal personal representative. And your orator further sheweth, that the said suit and proceedings have become abated by the death of the said J. A., and your orator is, as he is advised, entitled to have the said suit and proceedings revived against the said defendant G. T. W., and the said accounts by the aforesaid order of reference directed, prosecuted and carried on, and to have the said cause put in the same plight and condition as the same was in previously to the abatement thereof by the death of said J. A.

To the end, therefore, that the said defendant may answer the premises; and that the said suit and proceedings which so became abated as aforesaid may stand revived, and be in the same state and condition as the same were in at the time of the death of the said J. A., or that the defendant may show good cause to the contrary; May it please your honors to grant unto your orator a writ of subpoena to revive [and answer], issuing out of and under the seal of this honorable Court to be directed to the said G. T. W., thereby commanding him at a certain day and under a certain penalty, to be therein limited, personally to be and appear before your honors, in this honorable Court, then and there [to answer the premises and] to show cause, if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abatement thereof: and further to stand to, and to abide, such order and decree in the premises as to your honors shall seem meet. And your orator shall ever pray, &c. [*Where it is only necessary to pray a subpoena to revive, the words within brackets should be omitted.*]

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98. *Bill of revivor on the marriage of a female plaintiff.*

Humbly complaining, show unto your honors, your orator and oratrix, A. B., of &c., and E. B. his wife, that on or about —, your oratrix, by her then name, of E. M., exhibited her original bill of complaint in this honorable Court against — and W. M., as defendants thereto, thereby stating, &c., and praying, &c. [*state the prayer of the bill*]. And your orator and oratrix further show, that the said several defendants being duly served with process, severally appeared and put in their answers to the said original bill; as in and by, &c. And your orator and oratrix further show, that your oratrix took several exceptions to the answer put in by the said defendant W. M. to the said original bill, and which said exceptions were, upon argument, allowed by the master, to whom the same was referred. And your orator and oratrix further show, that your oratrix afterwards obtained an order of this honorable Court to amend

her said original bill, and that the said defendant W. M. might answer the said amendments at the same time that he answered the said exceptions. And your orator and oratrix further show, that before the said W. M. had put in his answer to the said exceptions, or any further proceedings were had in the said suit, and on or about the —— day of ——, your oratrix intermarried with your orator A. B., whereby the said suit and proceedings became abated. And your orator and oratrix are advised that they are entitled to have the same revived, and to be put in the same plight and condition as the same were in at the time of the abatement thereof. To the end, therefore, that the said suit and proceedings, which so became abated as aforesaid may stand revived, and be in the same plight and condition as the same were in at the time of such abatement, or that the said defendants may show good cause to the contrary; May it please your honors to grant unto your orator and oratrix a writ of subpoena to revive, issuing out of, and under the seal of this honorable Court, to be directed to the said W. M., thereby commanding him, at a certain day, and under a certain penalty to be therein inserted, personally to be and appear before your honors in this honorable Court, then and there to answer and show cause, if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abatement thereof, and further to stand to and abide such order and decree in the premises as to your honors shall seem meet.

And your orator and oratrix will ever pray, &c.

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99. *Bill of Revivor and Supplement, in a case which was considered as not falling within either of sections 52 and 53, of 15 and 16 Vict. c. 86.<sup>1</sup>*  
*[Modern English Form.]*

M. S., H. S., and E. S., infants, by A. B.,	}	Plaintiffs.
their next friend, . . . . .		
and		
S. D. and F. D., his wife, R. B. and E. B., his	}	Defendants.
wife, R. J. B., J. S., J. B., A. S., and L. A.,		

*Bill of Revivor and Supplement.*

To &c.

Humbly complaining, &c.

1. *[Original bill filed by two defendants, the femmes covert, then both unmarried and infants; and the plaintiffs in the supplemental suit against the*

<sup>1</sup> See ante, Vol. II. pp. 1589, 1604, 1605.

*defendants J. S., A. S., and L. A., stating will of C. D., devising real estates to L. A. and other trustees (deceased), under which the children of the testator's son, the plaintiffs in the original cause, and the defendant J. S., and also the defendant A. S., took beneficial interests, and praying the execution of the trusts of the will.]*

2. [*Appearance of the defendants to original bill.*]

3. Divers proceedings and orders have since been taken and made respectively in said original suit.

4. The above-named defendant F. D., then F. S., attained the age of twenty-one years on the &c., and on the &c. she intermarried with and became the wife of the defendant S. D., and the said suit thereby became abated.

And by way of supplement the above-named plaintiffs show as follows : —

5. No settlement affecting the share or interest of the above-named defendant F. D. in the said real estates has ever been made.

6. By an order made by his Honor &c., on &c., it was ordered that upon producing to the registrar an office copy of an affidavit, proving the due execution by all parties of a deed in exact conformity with the draft articles for a settlement in the order mentioned, the defendant E. B., then E. S., and the defendant R. B. should be at liberty to intermarry.

7. [*Articles for settlement accordingly, of which J. S. and J. B. are trustees, and by which defendant R. B. covenanted to settle his intended wife's share in the estates, upon trust for her separate use for life, with remainder for the benefit of their children. The trusts are shortly stated.*]

8. The marriage between the defendants R. B. and E. B., his wife, was duly solemnized, and the said A. B. has since attained the age of twenty-one years.

9. There has been issue of the last-mentioned marriage, one child only, viz. the above-named defendant R. J. B.

10. Under the circumstances aforesaid, the said original suit and proceedings have become defective as well as abated, and the above-named plaintiffs are desirous that the same should be revived, and should be carried on and prosecuted between the parties to this suit, in manner hereinafter prayed.

#### *Prayer.*

The plaintiffs pray as follows :

1. That the said suit, orders, and proceedings may stand revived, and be in the same plight and condition that the same would have been in if the same had not become abated, and that this suit, so far as may be necessary or proper, may be deemed and taken to be supplemental to the said original suit as revived ; and that the orders and proceedings in said last-mentioned suit may be carried on and prosecuted between the parties to this

suit, in the like manner as between the parties to the said original suit as revived.<sup>1</sup>

2. [*General relief.*]

Names of defendants.

The defendants, &c.

100. *Bill of revivor and supplement, another form.* [*Modern English Form.*]

Between W. L. and C. C., his wife, . . . Plaintiffs,  
and  
W. R., A. S., and others, . . . Defendants.

[*The bill<sup>2</sup> stated the will of the testator, appointing the defendants W. R. and J. S., deceased, executors, and contained statements as to legatees, and the deaths of several of them. It also stated the filing of the original bill by some of the legatees against the executors and residuary legatees, and a decree directing the usual accounts of the estate of the testator, with class and other inquiries. The bill then alleged that the decree had been carried into the Master's office ; that certain accounts had been taken, but no report had been made.*]

“The plaintiffs further state, by way of supplement,” &c. [*The bill then stated the deaths of the plaintiffs, and of several of the defendants, including J. S., one of the executors.*] The said suit having become abated in manner aforesaid, no proceedings have been taken to revive the same.”

<sup>1</sup> In the case in the text it was considered that a supplemental bill was necessary, and that it did not fall under sects. 52 & 53, of the 15 & 16 Vict. c. 86, or either of them. The cases, however, upon the subject are not satisfactory. In the following cases where there was a *transmission* of interest, the 52d sect. has been held to apply. *Atkinson v. Parker*, 2 De G. M. & G. 221 ; *Fullerton v. Martin*, 1 Drew. 238 ; *Lash v. Miller*, 4 De G. M. & G. 841 ; *Pickford v. Brown*, 1 Kay & J. 643 ; *Hall v. Clive*, 20 Beav. 575 ; *Notley v. Palmer*, 1 Jur. N. S. 221, V. C. K. In *Jebb v. Tugwell*, 24 L. J. Ch. 670, the Master of the Rolls ordered that an infant, who was born pending the suit and had not been brought before the Court by supplemental bill or otherwise, should be bound by the decree. And see the earlier cases of *Petre v. Petre*, 1 W. Rep. 362 ; *Morritt v. Walton*, 2 W. Rep. 544 ; *Hart v. Tulk*, 2 W. Rep. 131 ; ante, vol. ii. p. 1604.

<sup>2</sup> *Leggo v. Richards*, V. C. Kindersley, 20 Jan'y, 1857, MSS. It is to be observed, that in this case the supplemental bill was filed by one of the *defendants* to the original bill and her husband, and was therefore sustainable, and not open to objection, (as it would have been if the plaintiffs in the original suit had filed it) that, on the ground of the further relief sought, it was a supplemental bill in the nature of a bill of review, which cannot be filed without the leave of Court. *Berrow v. Morris*, 10 Beav. 437 ; *Hodson v. Ball*, 11 Sim. 456 ; *Taylor v. Taylor*, 1 M. & G. 397.

As to supplemental bill after decree, see ante, vol. ii. p. 1612. Such a bill should be in aid of the directions contained in the decree on the original suit. *Wilson v. Todd*, 1 M. & Cr. 42, 47.

[*The bill then set forth facts and circumstances for the purpose of charging the surviving executor, and the estate of the deceased executor represented by the defendant A. S., with wilful default, and of declaring certain purchases made by the surviving executor of portions of the testator's estate void, and the bill also contains the following general charge:—*]

The defendant W. R., and the said J. S., also, in many other respects, wasted and mismanaged the said testator's estate, and thereby occasioned very considerable loss thereto; and they have neglected to call in and receive various parts of such estate, and have allowed the same to remain outstanding upon insufficient security,<sup>1</sup> and have also retained large balances from time to time in their hands, without investing the same.

The plaintiffs have never received anything on account of the legacy bequeathed to the plaintiff C. L., by the said will, or in respect of any part of the residuary estate of the said testator, although, from time to time, since the abatement of said suit they have made frequent applications to the defendant W. R. for an account of the real and personal estate of the said testator, and for payment of what was due to them in respect thereof.

The defendants W. R. and J. S. purchased, or procured to be transferred into their joint names, various large sums of bank annuities, forming a part of the said testator's estate, a considerable part of which has been since sold out by the said W. R., and applied for purposes not sanctioned by the said testator's said will, and the defendant W. R. threatens and intends to sell out and apply, in like manner, the remainder of bank annuities.

### *Prayer.*

The plaintiffs therefore pray as follows:—

*Prayer to revive.*] 1. That the said suit and proceedings which so became abated as aforesaid may stand and be revived, and be in the same plight and condition as the same were in at the time of the abatement thereof.

2. That the said decree made on the hearing of the said cause may be prosecuted and carried into effect, and that the plaintiffs may have the full benefit thereof.

3. That an account may be directed by this honorable Court of all the personal estate of the said testator, which would, but for the wilful neglect or default<sup>2</sup> of the said W. R. and J. S., or either of them, have come to their or either of their hands.

<sup>1</sup> *Caney v. Bond*, 6 Beav. 486; *Ratcliffe v. Winch*, 17 Beav. 217; *Buxton v. Buxton*, 1 My. & Cr. 80; *Hughes v. Empson*, 22 Beav. 181; *Bate v. Hooper*, 4 De G. M. & G. 338.

<sup>2</sup> The plaintiff should charge wilful default in the bill, and establish a *prima facie* case thereof at the hearing. *Shepherd v. Towgood*, Turn. & R. 379; *Garland v. Littlewood*, 1 Beav. 527. And the decree should either contain some declaration, or direct some

4. That the purchase<sup>1</sup> hereinbefore mentioned to have been made by the defendant W. R., of the said freehold and leasehold premises at —, may be declared to be void and of no effect; or that the said W. R. and J. S. may be declared bound to make good to the said testator's estate the full present value of such premises, and that all proper and necessary directions may be given, and inquiries made, to give effect to such declaration.

5. That in taking the account by the said decree, and hereinafter sought to be taken, the said W. R. and J. S. may be disallowed all costs, charges, and expenses incurred by them, or either of them, in consequence of their not having duly converted and invested the said testator's estate, pursuant to the directions of the said testator's will.

6. That the defendant A. S. may admit assets of the said J. S. sufficient to meet what shall be found due from the said J. S., upon taking the said several accounts, or that all proper and necessary accounts may be taken of the personal estate and effects of the said J. S.

7. That some proper person may be appointed to get in and receive the outstanding personal estate and effects of the said testator, with all proper and necessary directions in that behalf; and that the defendant W. R., his servants and agents, may be restrained, by the order and injunction of this honorable Court, from getting in and receiving any part thereof, and from selling out, parting with, or disposing of, except under the sanction of this Court, any part of the bank annuities now standing in his name as aforesaid, in the books of the Governor and Company of the Bank of England.

8. That, for the several purposes aforesaid, all necessary accounts may be taken, directions given and made.

inquiries with a view to determining the question as to the wilful default of the accounting party, otherwise the question will not be open on the cause coming on for further consideration. *Jones v. Morrall*, 2 Sim. N. S. 241; 21 L. J. Ch. 630. As to charging executor with *interest*, see *Attorney-General v. Alford*, 4 De G. M. & G. 843. As a general rule, an executor is not justified in carrying on the testator's trade except for purposes of winding up. *Collinson v. Lister*, 20 Beav. 356; 24 L. J. 762; 25 L. J. Ch. 38.

<sup>1</sup> See form of decree where a trustee purchases a trust estate at an alleged under-value, and claims the benefit of permanent improvements. *Williamson v. Seaber*, 3 Y. & C. Exch. 717.

101. *Bill of revivor and supplement by the executors of the deceased plaintiff in the original bill against the administratrix and heiress-at-law of the deceased defendants, against whom the original bill had been exhibited for a foreclosure of a mortgage of freehold and leasehold property.*

To &c.

Humbly complaining, show unto your honors your orators R. W., of &c., and N. W., of &c., executors, named and appointed in and by the last will and testament of H. W., late of &c., gent., deceased, that, on or about the — day of —, the said H. W., exhibited his bill of complaint in this honorable Court against T. W., late of &c., gent., deceased, thereby praying that the said T. W. might be decreed by this honorable Court, to come to a just and fair account with the said H. W., for the principal and interest then due and owing to him on the mortgage security, in the said bill mentioned, and might pay the same to the said H. W. by a short day to be appointed by this honorable Court, together with his costs; and in default thereof, that the said T. W. might stand absolutely barred and foreclosed of and from all manner of benefit and advantage of redemption or claim in or to the residue of two several terms of five hundred years and four hundred years in the respective mortgaged premises in the said bill mentioned, and every part thereof. And the said defendant T. W. being duly served with process appeared thereto, and departed this life on or about the — day of —, without having put in his answer to the said bill. And your orators show unto your honors, by way of supplement to the said original bill, that the said defendant T. W. departed this life intestate, leaving his wife, E. W., a defendant hereinafter named, *enciente* with a child since born and named A. W., and the said A. W. is now the sole heiress-at-law of the said T. W., deceased, and as such entitled to the reversion and remainder of the freehold part of the said mortgaged hereditaments and premises, expectant upon the determination of the said term of five hundred years therein. And your orators further show, that on the — day of —, letters of administration of the goods, chattels, and effects of the said T. W., deceased, were duly granted unto his widow, the said E. W., who is thereby become his sole personal representative. And your orators show unto your honors that the said complainant H. W. departed this life on or about the — day of —, having previously duly made and published his last will and testament in writing, bearing date on or about the — day of —, and thereof appointed your orators joint executors, and on or about the — day of — your orators duly proved the said will in the proper Court, and took upon themselves the burden of the execution thereof. And your orators further show, that upon the death of the said H. W., the said several terms of five hundred years and four hundred years became, and the

same are now, vested absolutely at law in your orators, as his personal representatives, subject, nevertheless, to the redemption on payment of the principal money and interest thereby secured. And your orators further show unto your honors, that the said suit having become abated by the death of said T. W., your orators are advised that they, as the personal representatives of the said H. W., deceased, are entitled to have the same revived and restored as against the said E. W. and A. W., to the same plight and condition in which it was at the time of the death of the said T. W., and to have the same relief against the said E. W. and A. W. To THE END, therefore, &c.

And that the said E. W. and A. W. may answer the said original bill, and that they may be decreed by this honorable Court to come to a just and fair account with your orators for the principal and interest now due and owing to your orators on the said mortgage securities, and may pay the same to your orators by a short day to be appointed by this honorable Court, together with your orators' costs &c. &c., and that the said suit may stand and be revived against the said defendants, and be in the same plight and condition in which the same was at the time of the decease of the said defendant T. W., or that the said E. W. and A. W. respectively may show good cause to the contrary; May it please &c.

*Pray subpoena to revive and answer  
the original bill and supplemental bill  
against E. W. and A. W.*

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*Supplemental Statement.*

In Chancery.

Between &c.

[ *Title of original cause.* ]

Supplemental statement to be added to the original bill in this cause.

[ *Here state the facts or circumstances which have occurred since the filing of the bill, and which the plaintiff is desirous of putting in issue.*<sup>1</sup> ]

<sup>1</sup> It is to be borne in mind, that if the plaintiff is entitled to amend his bill, it will not be necessary to file a supplemental bill, to put in issue any facts or circumstances, which may have occurred after the institution of the suit; but they may be introduced by amendment; a supplemental statement, therefore, is only necessary where the cause is in such a state that the plaintiff is not at liberty to amend his bill. Ante, vol. ii. p. 1604, 1605.

## SECTION XXXII.

*Bills of Review.*102. *Bill of review for errors of law, apparent on the decree itself.*

To &c.

Humbly complaining, sheweth unto your honors your orator A. B., of &c., that on the — day of —, W. S., of &c., the defendant hereinafter named, exhibited his bill of complaint in this honorable Court against your orator, and thereby set forth that &c. [*here insert the original bill*]. And your orator being served with the proper process for that purpose, appeared and put in his answer to the said bill, to the effect following [*here recite the substance of answer*]. And the said W. S. replied to the said answer, and issue having been joined, and witnesses examined, and the proofs closed, [*or, the said W. S. joined issue on the answer and*] the said cause was set down to be heard, and was heard, before your honors, on the — day of —, when a decree was pronounced, which was afterwards passed, and entered, in which it was set forth and recited, that it was at the hearing on your orator's behalf, insisted that your orator had, by his answer, set forth that &c. [*here insert the recital and decree*]. And the said decree has since, and on or about the — day of —, been duly signed and enrolled, which said decree your orator insists is erroneous, and ought to be reviewed, reversed, and set aside for many apparent errors and imperfections, inasmuch as it appears by your orator's answer, set forth in the body of said decree, [*here insert the apparent errors.*] And no proof being made thereof, no decree ought to have been made or grounded thereon, but the said bill ought to have been dismissed for the reasons aforesaid. In consideration whereof, and inasmuch as such errors and imperfections appear in the body of the said decree, and there is no proof on which to ground any decree to set aside the said rent-charge, your orator hopes that the said decree will be reversed and set aside, and no further proceedings had thereon. To THE END, therefore, that the said W. S., &c.; and that for the reasons and under the circumstances aforesaid, the said decree may be reviewed, reversed, set aside, and no further proceedings taken thereon, and your orator permitted to remain in the undisturbed possession and enjoyment of the said rent-charge.

May it please, &c.

[*Prayer for subpoena in usual form.*]

103. *Bill of review on discovery of new matter.*

Humbly complaining, sheweth unto your honors your orator, A. B., of &c., that on or about —, C. D., of &c., the defendant hereinafter named, exhibited his bill of complaint in this honorable Court against your orator, and thereby set forth that &c. [*Here insert the original bill.*] And your orator being duly served with process for that purpose, appeared and put in his answer to the said bill, to the effect following: [*Here state the substance of the answer.*] And the said C. D. replied to the said answer, and issue having been joined and witnesses examined, and the proofs closed, [*or, the said C. D. joined issue on the answer, and*] the said cause was set down to be heard, and was heard before your honors, on the — day of —, when a decree was pronounced, whereby your honors decreed that your orator's title to the premises was valid and effectual, after which the said C. D. petitioned your honors for a rehearing, and the said cause was accordingly reheard, and a decree of reversal made by your honors on the ground of the said C. D. being the heir-at-law of the said E. F., deceased, and which said decree of reversal was afterwards duly signed and enrolled, as by the said decree and other proceedings now remaining filed as of record in this honorable Court, reference being thereto had, will appear. And your orator sheweth unto your honors, by leave of this honorable Court first had and obtained for that purpose, by way of supplement, that since the signing of the said decree of reversal, your orator has discovered, as the fact is, that the said E. F. was, in his lifetime, seized in his demesne as of fee, of and in the hereditaments and premises in question in the said cause, and that the said E. F., while so seized, and when of sound mind, duly made and published his last will and testament in writing, bearing date on the — day of —, which was executed by him, and attested according to law, and thereby gave and devised unto the said J. W., his heirs and assigns forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in question in the said cause (to which your orator claims to be entitled as purchaser thereof from the said J. W.) And your orator further sheweth unto your honors, that since the said decree of reversal was so made, signed, and enrolled, as aforesaid, and on or about —, the said C. D. departed this life, intestate, leaving G. H., of &c. (the defendant hereinafter named) his heir-at-law, who, as such, claims to be entitled to the said hereditaments and premises, in exclusion of your orator. And your orator is advised and insists that, under the aforesaid circumstances, the said last-mentioned decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed; and that the first decree, declaring your orator entitled to the said hereditaments and premises, should stand, and be established and confirmed; and for effectuating the same, the said several proceedings, which

became abated by the death of the said C. D., should stand and be revived against the said G. H., as his heir-at-law.

To THE END, therefore, &c. And that the said suit may be revived against the said G. H., or that he may show good cause to the contrary, and that the said last decree, and all proceedings thereon, may be reviewed and reversed, and that the said first-mentioned decree may stand and be established and confirmed, and be added to, by the said will being declared a good and effectual devise of such hereditaments and premises, as aforesaid; and that the said G. H. may be decreed to put your orator into possession of the said hereditaments and premises, and in the same situation, in every respect, as far as circumstances will now permit, as your orator would have been in case such last decree had never been pronounced and executed; and that your orator may have such other &c. May it please, &c. ; [*Pray subpoena to revive and answer against the said G. H.*]

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### SECTION XXXIII.

*Bill in the Nature of a Bill of Review, where a Party is bound by a Decree.*

104. *Supplemental bill in the nature of a bill of review. (Commence as in preceding.)*

Whereby your honors decreed that &c., (*state the effect of the decree,*) as by the said proceedings and decree now remaining as of record, in this honorable Court, reference being thereunto had, will appear. And your orator further sheweth unto your honors, (*state the supplemental matter, by leave of the Court &c.,*) that the said decree has never hitherto been signed and enrolled, and in consequence of the discovery of such new matter as aforesaid, your orator is entitled, as he is advised, to have the said cause heard thereon by your honors, when reheard on the said original bills (a petition for that purpose having been presented by your orator, and acceded to by your lordships) in the same manner as if such new matter had been put in issue in the said original suit. To the end, therefore, &c. (*Interrogate as to supplemental matters.*)

And that the said will may be established, and declared a valid and effectual devise of the said hereditaments and premises, and that the said cause may be heard on such new and supplemental matter as aforesaid, at the same time that it is reheard on the said original bill; and that your orator may have such further and other relief as, under the circumstances hereinbefore particularly mentioned to your honors, shall seem meet, and the nature of this case, as it hereby appears, may require. May it please, &c.

## SECTION XXXIV.

*Bill to suspend a Decree.*

105. *To enlarge the time of performance of a decree, on the ground of inevitable necessity, which prevented a party from complying with the strict terms of it.*

Humbly complaining, sheweth unto your honors your orator A. B., of &c., that your orator, on the — day of —, borrowed the sum of \$ — from C. D., of &c., the defendant hereinafter named, and in order to secure to the said C. D. the repayment thereof, with legal interest, your orator, by an indenture, bearing date the — day of —, [*set forth the mortgage,*] bargained, sold, and conveyed unto the said C. D. the real estate named and described in the said indenture, subject to redemption, on payment by your orator of the said sum of \$ — and interest, as therein mentioned, as by the said indenture, reference thereto being had, will more fully appear. And your orator further sheweth, that the said C. D., on or about —, exhibited his bill of complaint to this honorable Court against your orator, for payment of what was then due to him for principal and interest on the said security, by a short day to be appointed for that purpose, or that your orator might be absolutely debarred and foreclosed from all right and equity of redemption in the said mortgaged premises; and your orator having put in his answer thereto, and submitted to pay what should appear to be due from him, the said cause came on to be heard before this honorable Court, on or about —, when it was referred to R. V., one of the Masters of this honorable Court, to take an account of what was so due from your orator to the said C. D. as aforesaid, and your orator was ordered to pay the same on the — day of —, or to be absolutely foreclosed of all right and equity of redemption in the said mortgaged premises, as by the said proceedings now remaining as of record in this honorable Court, reference being thereto had, will appear. And your orator further sheweth unto your honors, that your orator was duly prepared and was ready to pay what should be reported to be due from him; but, before the said Master made his report, your orator was sent in great haste, by the commands of his Majesty, Ambassador to the Court of Paris, on special and weighty affairs of state, which admitted of no delay; and your orator was, therefore, unable to make any provision for the payment of what should be so found due from him as aforesaid. And your orator further sheweth unto your honors, that the said Master, during your orator's absence, made his report, whereby he found that the sum of \$ — was due to the said C. D., for principal and interest from your orator, but no further proceedings have since been taken in the said cause. And your ora-

tor being ready and willing to pay the said sum of \$—— to the said C. D., and all subsequent interest thereon, is advised, that, on payment thereof, he is entitled, under the circumstances aforesaid, to have so much of the said decree as relates to the foreclosure of your orator's right and equity of redemption in the said mortgaged premises, suspended, and on payment thereof, to have a reconveyance of the said mortgaged premises from the said C. D., &c. To THE END, therefore, &c. And that the subsequent interest on the said sum of \$——, so reported to be due from your orator as aforesaid, to the present time, may be computed by the direction of this honorable Court, and that on the payment of the said sum of \$—— and such interest as aforesaid, the said decree of foreclosure may be suspended, and the said C. D. directed, at the expense of your orator, to reconvey the said mortgaged premises to your orator, or as he shall appoint, freed and absolutely discharged from the said mortgage. [*And for further relief.*] May it please, &c.

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#### SECTION XXXV.

##### *Bill to set aside a Decree obtained by Fraud.*

##### 106. *Bill to set aside a decree of foreclosure fraudulently obtained, and for a redemption.*

Humbly complaining, sheweth unto your honors your orator A. B., of &c., that T. B., of &c., deceased, your orator's late father, during his life, and on or about the —— day of ——, was seized in his demesne, as of fee, of and in the real estate hereinafter particularly described; and by indenture of that date, made between the said T. B., of the one part, and C. D., of &c., the defendant hereinafter named, of the other part, the said T. B., in consideration of \$——, bargained, sold, and conveyed unto the said T. B., his heirs and assigns, all &c., [*describe the mortgaged premises,*] subject to redemption on payment of the said principal money and lawful interest at the time therein mentioned, and long since past; as by the said indenture, reference being thereto had, will more fully appear. And your orator further sheweth, that the said T. B. departed this life on or about ——, leaving your orator his heir-at-law, and only child, then an infant under twenty-one years of age, that is to say, of the age of seven years or thereabouts, him surviving. And your orator further sheweth, that during your orator's minority, on or about ——, the said C. D. filed his bill of complaint in this honorable Court, against your orator, for a foreclosure of your orator's right and equity of redemption in the said mortgaged premises; but your orator was not represented in such bill to be

then an infant; and the said C. D. caused and procured one L. M., since deceased, who acted in the management of the affairs of your orator's said father, to put in an answer in the name of your orator, and without ever acquainting your orator, or any of his friends or relations, therewith; in which said answer a much greater sum was stated to be due from your orator, on the said mortgage security, to the said C. D., than in fact was really owing to him, and for which it was untruly stated that the said mortgaged premises were an insufficient security; and in consequence of such answer being put in, the said C. D. afterwards, in conjunction with the said L. M., on or about —, obtained an absolute decree of foreclosure against your orator, which your orator has only lately discovered, and of which your orator had no notice, and in which said decree no day is given to your orator, who was an infant when the same was pronounced, to show cause against it when he came of age; as by the said proceedings, now remaining as of record in this honorable Court, reference thereto being had, will more fully appear. And your orator further shows that your orator, on the — day of — last, attained the age of twenty-one years, and shortly afterwards, having discovered that such transactions had taken place during his minority as aforesaid, by himself and his agents, represented the same to the said C. D., and requested him to deliver up possession of the said mortgaged premises to your orator, on being paid the principal money and interest, if any, actually and fairly due thereon, which your orator offered, and has at all times been ready to pay, and which would have been paid by the personal representatives of the said T. B., out of his personal assets, during your orator's minority, had any application been made for that purpose. And your orator hoped that the said C. D. would not have insisted on the said decree of foreclosure, so fraudulently obtained as aforesaid, but would have permitted your orator to redeem the said mortgaged premises, as he ought to have done. BUT NOW SO IT IS &c., the said C. D., &c., pretends that the said decree of foreclosure was fairly and properly obtained, and that a day was therein given to your orator, when of age, to show cause against the same, and that your orator has neglected to do so, and that your orator is neither entitled to redeem, or to travel into the said accounts; whereas your orator charges the contrary thereof to be true, and that your orator only attained the age of twenty-one years on the said — day of —, and that he has since discovered the several matters aforesaid, by searching in the proper offices of this honorable Court; and your orator expressly charges that, under the circumstances aforesaid, the said decree, so fraudulently obtained, as hereinbefore mentioned, ought to be set aside, and your orator ought not to be precluded thereby, or in any other manner, from redeeming the said mortgaged premises, of which the said C. D. has possessed himself, by such means as aforesaid. All which actings &c. In consideration whereof &c. To the end, &c.; and that the said decree of

foreclosure may, for the reasons and under the circumstances aforesaid, be set aside by this honorable Court, and declared to be fraudulent and void; and that an account may be taken of what, if anything, is now due to the said C. D. for principal and interest on the said mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises, which have, or without his wilful default, might have been received by or on behalf of the said C. D., and if the same shall appear to have been more than the principal and interest due on the said mortgage, then that the residue thereof may be paid over to your orator, and that your orator may be at liberty to redeem the said mortgaged premises, on payment of the principal and interest, if any, remaining due on the said security; and that the said C. D. may be decreed, on being paid such principal money and interest, to deliver up possession of the said mortgaged premises, free from all incumbrances, to your orator, or as he shall appoint, and to deliver up all title-deeds and writings relating thereto. [*General relief.*] May it please, &c. [*Prayer for subpoena against C. D., &c.*]

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#### SECTION XXXVI.

##### *Bill in the Nature of a Bill of Revivor.*

107. *Where there has been a devise of real estate, against a vendee for the specific performance of an agreement.*

Your orator A. B., of &c. That your orator, on or about —, filed his bill of complaint in this honorable Court against C. D., of &c., thereby stating (*see form of specific performance of an agreement*). (*Set forth the material part of the bill, and the prayer.*) That the said C. D. being served with process of subpoena, appeared to the said bill, but before he put in his answer thereto, he, the said C. D., departed this life, having first, when of sound mind, duly made and published his last will and testament in writing, (which was executed by him, and attested as by law is required for passing real estates by devises,) and thereby gave and devised all his real estates, (comprising the estate so agreed to be sold by him to your orator as aforesaid,) to E. F., of &c., (the defendant hereinafter named,) his heirs and assigns forever, as by the said will, reference being thereunto had will appear. And your orator further sheweth unto your honors, that the said suit became abated by the death of the said C. D.; but notwithstanding your orator is advised that he is entitled to have the said agreement specifically performed by the said E. F. as such devisee as aforesaid; and which said devise your orator expressly charges is in every respect valid and ef-

fectual : To the end, therefore, &c. And that your orator, under the circumstances aforesaid, may have all such benefit against the said E. F. of the said suit, so commenced as aforesaid, as he would have had in case the said C. D. had been living, or that the said E. F. may show good cause to the contrary. May it please &c. (*Subpoena.*)

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### SECTION XXXVII.

#### *Bill to carry a Decree into Execution.*

108. *Where a decree of partition has been obtained and not executed.*

Humbly complaining sheweth unto your honors your orator A. B., of &c., that your orator, on or about the — day of —, filed his bill of complaint in this honorable Court against E. B., stating [*set out substance of a bill for partition*] and praying [*set out prayer verbatim*]. And your orator further sheweth, that due process having been served upon the said C. D., he appeared and put in his answer to said bill, to which answer a replication was filed [*or, on which answer issue was joined*]. And the said cause being duly at issue, the same came on to be heard, and was heard, before your honors on the — day of —, when your honors were pleased to order and decree that a commission should issue to certain commissioners to be therein named, to make partition of the estate in question, who were to take the depositions of witnesses to be examined by them, in writing, and return the same with the said commission ; and that the said estate was to be divided and separated, and one third part thereof set out in severalty and declared to belong to the said E. B. and his heirs ; and the remaining two-thirds thereof, declared to belong absolutely to your orator, to be held in severalty by him ; and the respective parties were decreed to convey their several shares to each other, to hold in severalty according to their respective undivided shares thereof ; and that it should be referred to H. R., one of the masters of this Court, to settle the conveyances, in case the parties differed about the same ; as by the said proceedings and decree now remaining as of record in this honorable Court, reference being thereunto had, will more fully appear. And your orator further sheweth unto your honors, that the commission awarded by the said decree never issued, on account of the said E. B. going abroad, and being, until lately, out of the jurisdiction of this honorable Court ; but the said E. B. having since returned, and the inconvenience mentioned in your orator's former bill [*for partition*] still subsisting, your orator is desirous of having the said decree forthwith carried into execution, but from the great length of time which

has elapsed, and the refusal of the said E. B. to concur therein, your orator is advised the same cannot be done without the assistance of this honorable Court. To THE END, therefore, &c. And that the said decree may be directed to be forthwith carried specifically into execution, and the said E. B. ordered to do and concur in all necessary acts for that purpose. May it please &c. [*Prayer for subpoena against E. B.*]

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### SECTION XXXVIII.

#### *Cross Bill.*

109. *Cross bill by an administrator de bonis non of a deceased executor, to have a general release executed, &c.*

Humbly complaining sheweth unto your honors your orator T. B., of &c., administrator of the goods and estate which were of R. H., late of &c., deceased, at the time of his death, left unadministered by M. H., late of &c., in her lifetime, now deceased, and which said M. H. in her lifetime, and at the time of her death, was administratrix of the goods and estate which were of the said R. H., deceased, at the time of his death; that J. M., late of &c., deceased, when of sound mind, duly made his last will and testament in writing, and thereby after bequeathing several pecuniary legacies, gave the residue of his goods and estate, subject to the payment of his debts, to his daughter H., then an infant under the age of twenty-one years, but now the wife of J. C., of &c., (and which J. C. and H., his wife, are two of the defendants hereinafter named,) and thereby appointed R. P., of &c., (another defendant hereinafter named,) and the said R. H., executors of his said will; as by the said will, reference being thereunto had, will more fully appear. And your orator further sheweth unto your honors, that the said testator died on or about the — day of —, without altering or revoking his said will, leaving his said daughter H. him surviving; and upon, or soon after his decease, the said R. P. and R. H., as such executors as aforesaid, duly proved the said will in the proper Court, and the said R. P. who principally acted in the execution of the said will, (the said R. H. having only interfered for the sake of conformity,) under and by virtue of such probate, possessed himself of a considerable part of the said testator's goods and effects.

And your orator further sheweth unto your honors, that the said R. H. departed this life on or about —, and shortly after his decease letters of administration were duly granted to the said M. H., his wife, who died on or about —; and after her decease such letters of administration of the

unadministered goods and estate of the said R. H. deceased as aforesaid, were duly granted to your orator by the proper Court of Probate, as by such letters of administration, reference being thereunto had, will appear.

And your orator further sheweth unto your honors, that the said R. H., previously to his death, accounted for and paid to the said R. P., as such co-executor as aforesaid, all such part of the estate of the said testator as had been received by him, the said R. H., as such executor as aforesaid, and no part of the said estate remained in the hands of the said R. H., at the time of his decease, previously whereto the said R. H. resided in the country, where his house was robbed, and all papers relative to his acts as such executor as aforesaid, and for which he had accounted as hereinbefore mentioned, were stolen, and have never hitherto been recovered.

And your orator further sheweth unto your honors, that the said J. C. and H., his wife, duly intermarried previously to the said H. attaining the said age of twenty-one years, which she has since done, and after that period the said R. P. duly accounted for the residue of the said testator's estate with the said J. C. (who in the right of said H., his wife, became entitled to receive the same) and thereupon obtained a general release from the said J. C. and H., his wife, of all demands in respect thereof, as by the said release, reference being thereunto had, will appear. And your orator hoped, under the circumstances aforesaid, he would not have been called upon for any account of the administration of the said testator's estate. But now so it is, may it please your honors, &c., that the said J. C. & H., his wife, &c., have lately filed their bill in this honorable Court against your orator as such representative of the said R. H., deceased, as aforesaid, for an account of the estate of the said testator J. M. received by the said R. H., deceased, in his lifetime, as such executor as aforesaid, thereby praying that your orator may be decreed to pay the said J. C., in right of his wife, what, upon such account, shall appear to be due to the said J. C., in right of the said H., his wife, out of the assets of the said R. H.; and to which said bill they have made the said R. P. a defendant, without praying any account or relief against him. And they pretend that there are various receipts and accounts [*particularizing those charged in the original bill*] of the said R. H., deceased, as such executor as aforesaid, as to the estate of the said testator, which remained unaccounted for by the said R. H. at his decease, and which ought to be paid by your orator. Whereas your orator charges the contrary thereof to be true [*negating specifically the pretended receipts and accounts*]; and that an account was stated, and a settlement of accounts took place between the said R. H., previously to his death, and the said R. P., and that an account has likewise been stated and settled by and between the said R. P. as such surviving executor as aforesaid, and the said J. C. in right of the said H., his wife, since she attained the age of twenty-

one years as aforesaid ; and that no demand was ever made on the estate of the said R. H. in respect of his accounts, until lately, when the loss of such papers as aforesaid was discovered, and of which loss your orator charges an undue advantage is intended and attempted to be taken ; and your orator also charges, that the said R. P. abets the said J. C. and H., his wife, in their proceedings, and refuses to indemnify the personal estate of the said R. H., in respect of his accounts in the execution of the will of the said testator J. M. so accounted for by him, and settled with the said R. P. as aforesaid ; and the said R. P. also refuses to inform your orator what he knows of the matters aforesaid, or any of them, and also denies such statements as have been made by him relative thereto. All which actings &c. In tender consideration whereof &c. To THE END, therefore, &c. And that the said J. C. and H., his wife, may be decreed to execute to your orator, as such administrator of the goods and estate of the said R. H., deceased, left unadministered by the said M. H., also deceased, at the time of her death, a general release of all claims and demands upon such unadministered estate and effects of the said R. H. deceased as aforesaid, in respect of all the accounts of the said R. H. in the execution of the will of the said testator J. M. ; or that an account may be taken of the said estate of the said testator J. M., received by the said R. H., and of his application thereof ; your orator being willing and hereby offering to pay what, (if anything,) shall appear to be due on the balance of such account ; and that the said R. P. may be decreed to indemnify the estate of the said R. H., and your orator, as such administrator thereof as aforesaid, in respect of such part thereof as the said R. H. paid to, or by the order, or for the use of the said R. P., or otherwise to account for and pay the same to your orator. And that the said J. C. and H., his wife, may be decreed to pay to your orator his costs of this suit. And that your orator may have such other and further relief, &c. May it please, &c.

## CHAPTER V.

## SECTION XXXIX.

*Informations.*

110. *Information to restrain the making a carriage road and breaking up a public footpath, in order to prevent certain streets from being made thoroughfares for carriages contrary to the intention of a statute.*

Informing, sheweth unto your honors, C. I. R., of &c., Esq., Attorney-General of the State [or Commonwealth] of &c., at and by the relation of A. B., &c., &c., against D. Y. &c., &c., that there is situate, lying and being within the town of —, a certain public street, called V. lane, leading from a certain other public street, called B. street, to a certain other public street, called G. street, and communicating on the north side thereof with certain other public streets, called C. street, old B. street, and S. row. And the Attorney-General aforesaid, by the relation aforesaid, further sheweth that at the east end of the said street, called N. lane, there is a certain other public street, called S. street, leading from thence into a certain other public street, called P. street, and that along the south side of said street, called V. lane, from S. street to B. street, there is, and for years past has been a common and public footpath, which has been from time to time paved with flagstones at the expense of the inhabitants of the said town of —, for the convenience of persons passing and repassing on foot, the said street, called V. lane, being a great public thoroughfare for foot passengers from B. street to S. street, although there is not nor ever has been any thoroughfare for carriages along the said street from B. street to S. street, by reason of certain wooden posts, which are, and ever since the making of the said street, called V. lane, have been placed across the said street a few feet to the eastward of S. row. And the Attorney-General aforesaid by the relation aforesaid sheweth that the said common and public footway from B. street to S. street is and ever since the making of the same has been bounded on the south for the most part by a certain ancient brick wall, which forms the northern fence and boundary of certain lands called M. Gardens and B. Gardens, and that there is not nor ever has been any public way or opening on the north side of the said footway so that the people of the — in passing and repassing on the same footway have at all times had the free and uninterrupted use thereof without any hurt, hinderance, or obstruction whatsoever. And the Attorney-General aforesaid by the aforesaid relation further sheweth that upwards of —

years since, the then owners of the said lands called M. Gardens and B. Gardens, severally claimed a right to open a public street or way from P. through their respective lands into the said street, called V. lane, and threatened to make a public street or streets accordingly, but such claim being resisted on the part of the proprietors and inhabitants of the said several streets, called V. lane, C. street, old B. street, and S. row, by reason of the disturbance and injury that would thereby be occasioned to the said several streets, the said owners of the said lands thought fit to abandon such claim, and afterwards by an act of the —, made and passed on the — day of —, entitled, "An Act," &c., it was provided, &c., which provision was inserted in the said act for the purpose of protecting the said streets called V. lane, S. row, C. street, and old B. street, from any thoroughfare for carriages from P. to the said street called V. lane, by the way of S. street or by any other means than by the way of B. street. And the Attorney-General aforesaid by the relation aforesaid further sheweth that said D. Y., proprietor of the said lands called M. Gardens, and the defendant hereinbefore named, has formed a plan for making, and is about to make, a public street or way for horses, carts, and carriages, from P. through the said lands called M. Gardens and the public street called V. lane, over the aforesaid common and public footway on the south side of the said street; and in and towards the execution of such plan has actually made an opening in the said ancient boundary wall, and has taken up a part of the flag pavement of the said footway. And the said Attorney-General at the aforesaid relation further sheweth, that such public street or way so intended to be made by the said defendant D. Y., if carried into execution, will greatly interrupt and obstruct the said common and public footway on the south side of the said street, called V. lane, and will be to the great damage and common nuisance of all the people of —, passing and re-passing by the said footway. And the Attorney-General aforesaid at the relation aforesaid further sheweth, that such intended street, if carried into execution, will be opposite to the end of S. row and westward of the said wooden posts, so as aforesaid placed across the said street called V. lane, and by making a direct thoroughfare for horses, carts, and carriages from P. into the said street called V. lane, will actually defeat the provision made as aforesaid in the said Act for the protection of the said streets called V. lane, S. row, C. street, and old B. street, from any thoroughfare for carriages, and will therefore be contrary to the true intent, meaning, and spirit of the said Act. To THE END, therefore, that the said D. Y. may, according to the best of his knowledge, remembrance, information, and belief, &c.

And that the said defendant may answer the premises; and that the said defendant, his agents, servants, and workmen, may be restrained by the order and injunction of this honorable Court from proceeding to make and

open any public street or way from the said lands called M. Gardens into the said street called V. lane, over the said common and public footway; and that the said defendant may be directed to replace the flagstones of the said footway so as aforesaid removed by him or by his order, and to put the same footway into the same state and condition as the same was in before his obstruction aforesaid. [*And for further relief.*]

J. L.

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111. *Information at the relation of certain freeholders and inhabitants of a parish, forming a society called "The Twenty-Four," by whom the affairs of the parish were managed, to establish a bequest of stock for the benefit of the poor of a certain district within the same parish, praying also to have the stock transferred into the — name of —.*

In Chancery.

To &c.

Informing, sheweth your honors, C. I. R., of &c., Esq., Attorney-General of the State [or Commonwealth] of &c., at and by the relation of E. C. R., W. G., &c., &c., all housekeepers and inhabitants, having freehold estates within the parish of T., in the county of N., that there has been from time immemorial within the said parish a certain society consisting of twenty-four persons, being housekeepers and inhabitants, and having freehold estates within the said parish, and which said society has always been, and still is, called or known by the name or description of "The Twenty-Four"; twelve of which twenty-four have from time immemorial been elected or chosen out of the principal inhabitants having freehold estates within the township or district of N. S., within the said parish, and the remaining twelve out of the principal inhabitants having freehold estates within the rest of the said parish, commonly called the country part of the said parish, the said twenty-four persons having constantly had the direction and management of the business and concerns of the said parish. And the Attorney-General aforesaid, at the relation aforesaid, also informeth your honors, that, upon the death of any one or more of the said society, or in case of his or their selling or disposing of his or their freehold or freeholds within the said parish, the survivors and others of the said society have been from time to time, whereof the memory of man is not to the contrary, used and accustomed to elect and choose, and have accordingly elected and chosen, on the — day of — following such event, some other person or persons to be a member or members of the said society in the room or stead of the person or persons so dying or disposing of his or their freehold as aforesaid. And the Attorney-General aforesaid, at the relation aforesaid, further informeth your honors, that the relators and H. H., late of W., in the county of N., Esq., were the persons who were last elected or chosen

as members which composed the said society; and the said H. H. having lately departed this life, your relators are the surviving and present members of the said society. And the Attorney-General aforesaid at the relation aforesaid, further informeth your honors that M. R., late of &c., widow, deceased, in her lifetime duly made and published her last will and testament in writing, bearing date on or about the — day of —, and thereby amongst other things, appointing R. J. and P. P., of &c., Esqs., executors thereof, she gave and bequeathed unto her said executors in the words and figures or to the purport and effect following, that is to say: "I give, devise and bequeath unto the said P. P. and R. J., and the survivor of them, and the executors and administrators of such survivor, the sum of \$ —, East India annuities, part of which is now standing in my name in the banks of that company, in trust that they, my said trustees and the survivor of them, and the executors and administrators of such survivor, do and shall pay to, authorize, and permit and suffer the housekeepers and inhabitants of the township of N. S., commonly called "The Twenty-Four," for the time being forever, to receive the dividends, produce, and interest of the said sum of \$ — East India annuities, as and when the same shall become due and payable, in trust to be by them or any five or more of them, paid, applied, and disposed of from time to time forever, unto and amongst such of the poor of the said township as they shall think proper"; as in and by such will and the probate thereof, relation being thereunto had, will more fully appear. And the Attorney-General aforesaid, at the relation aforesaid, further informeth your honors, that the said testatrix, M. R., departed this life on or about the — day of —, without revoking or altering her said will, and upon or soon after her death the said P. P. and R. J. duly proved the said will in the appropriate Court, and undertook the executorship thereof. And the Attorney-General aforesaid, at the relation aforesaid, further informeth your honors that the said testatrix, M. R., was at the time of her death possessed of or entitled unto a considerable personal estate, consisting of many valuable particulars, and particularly she was possessed of or entitled unto a considerable sum of money in East India annuities to a much larger amount than the said legacy; and upon or shortly after her decease, the said P. P. and R. J., by virtue of the said will and the probate thereof, possessed themselves of all the said personal estate and effects, and procured the said East India annuities to be transferred into their names. And the Attorney-General aforesaid at the relation aforesaid, further informeth your honors that the personal estate and effects late of or belonging to the said testatrix, and possessed by her said executors since her decease, were more than sufficient (exclusive of the said East India annuities) for the payment of all her debts, funeral expenses, and legacies, all which debts, funeral expenses, and legacies, save the aforesaid charitable legacy, have been long since fully paid and dis-

charged; and the said East India annuities now remain standing in the names of the said P. P. and R. J., to answer and satisfy the aforesaid legacy. And the Attorney-General aforesaid, at the relation aforesaid, further informeth your honors, that your relators being the persons meant and intended in the said testatrix's will mentioned, of the housekeepers and inhabitants of the township of N. S., commonly called "The Twenty-Four," hoped that the said P. P. and R. J. would have paid and applied the interest or dividends of the said East India annuities for the benefit of such person or persons as are entitled thereto by virtue of the said testatrix's will. BUT NOW SO IT IS, may it please your honors, the said P. P. and R. J. decline to pay the interest of dividends of the said sum of \$ — East India annuities, unto your relators to be applied according to the direction of the said testatrix's will, alleging that they cannot do so with safety to themselves without the direction of this honorable Court for their indemnity therein. And the Attorney-General aforesaid charges that the charitable intentions of the said testatrix are in danger of being frustrated in process of time, when after the deaths of the said defendants, it may be difficult to find out who are or may be the personal representatives of the said testatrix, in order to obtain a representation to her, and the obtaining or procuring a representation to her will be attended with considerable expense, and therefore the said Attorney-General and the said relators charge that the said sum of money in annuities aforesaid ought to be transferred into the name of the — of this honorable Court upon the trusts and for the purposes aforesaid. TO THE END, therefore, that the said P. P. and R. J. may upon their several and respective corporal oaths, &c., &c.

And that the aforesaid charity may be established; and that the said P. P. and R. J. may be decreed to transfer the before-mentioned sum of \$ — in East India annuities into the name of the — of this honorable Court, upon the trust and for the purpose mentioned and expressed in the said testatrix's said will concerning the same, and that the trust thereof may be declared accordingly; and that the interest or dividends which have become due thereon since the death of the said testatrix, and which may hereafter become due thereon, may from time to time forever hereafter be paid to the relators and their successors, the twenty-four of the housekeepers and inhabitants of the said township of N. S., to be applied in the manner by the said testatrix's will directed, and that such further and other directions may be given for the establishment and maintenance of the said charity as to your honors may seem meet and this case may require. May it please, &c.

## CHAPTER VI.

## SECTION XL.

*Interrogatories.*

According to the present English practice, the bill of complaint contains no interrogatories for the examination of the defendant. But if the plaintiff requires an answer from any defendant, he must file interrogatories for that purpose within eight days after the time limited for the appearance of such defendant; and no defendant will be required to answer a bill until interrogatories shall have been so filed.<sup>1</sup>

112. *The form of such interrogatories is prescribed in the general orders of 7th August, 1852, as follows:*

In Chancery.

John Lee,	.	.	.	.	.	Plaintiff.
James Styles	.	.	.	.	.	} Defendants.
and						
Henry Jones,	.	.	.	.	.	

Interrogatories for the examination of the above-named defendants, in answer to the plaintiff's bill of complaint.

1. Does not the defendant Henry Jones claim to have some charge upon the farm and premises comprised in the indenture of mortgage of the first of May, one thousand eight hundred and fifty, in the plaintiff's bill mentioned?

2. What are the particulars of such charge, if any, the date, nature, and short effect of the security, and what is due thereon?

3. Are there or is there any other mortgages or mortgage, charges or charge, incumbrances or incumbrance, in any or what manner affecting the aforesaid premises or any part thereof?

4. Set forth the particulars of such mortgages or mortgage, charges or charge, incumbrances or incumbrance; the date, nature, and short effect of the security; what is now due thereon, and who is or are entitled thereto respectively, and when and by whom, and in what manner, every such mortgage, charge, or incumbrance was created.

The defendant James Styles is required to answer all these interrogatories.

The defendant Henry Jones is required to answer the interrogatories numbered 1 and 2.

Y. Y.

[*Name of Counsel.*]

<sup>1</sup> Ante, Vol. I. pp. 319, 379.

113. *As to a deed.*

1. Was not the indenture or deed of the — day of —, in the plaintiff's bill mentioned, or some and what other indenture or deed, of some and what other date, made between the several persons, and whether or not to the purport and effect in the plaintiff's bill in that behalf mentioned and set forth, or between some and what other persons, or to some and what purport and effect?

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114. *As to documents.*

1. Have not or has not the defendants, or some or one and which of them, now, or had not they, or some or one or which of them, heretofore and when last in their, or some or one and which of their, possession or power, or in the possession or power of their, or some or one and which of their, solicitors or solicitor, agents or agent, and whom by name, some and what deeds or deed, agreements or agreement, accounts or account, books of account or book of accounts, cash books or cash book, or other books or book, letters or letter, bills or bill of costs, receipts or receipt, vouchers or voucher, memoranda or memorandum, or some and what other documents or document, paper writings or paper writing, or some and what copies or copy, or extracts or extract of or from the several particulars aforesaid, or some or one and which of them, referring or relating to the several matters hereinbefore stated, or to some of them, and would not the truth of such matters, or of some and which of them, appear by such particulars if the same were produced?

2. Let the defendants severally set forth a full, true, and perfect list or schedule of all such particulars, distinguishing those which now are from those which once were, but are not now, in their respective possession or power.

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115. *As to personal estate.*

1. Set forth a full, true, and particular account of all the personal estate, [not specifically bequeathed,<sup>1</sup>] or of which the testator — died possessed or entitled, and the particulars whereof the same consisted at the time of his death, and the true and utmost value thereof, specifying the amount of cash in the testator's house, at his banker's or elsewhere, and the debts or sums of money owing to him, and from whom respectively; and set forth what part or parts of the said testator's personal estate has or have been received by the defendants — and —, or either and which of them,

<sup>1</sup> The passage within brackets should be omitted, if it is supposed that the personal estate is not sufficient for payment of debts.

or any person or persons, and whom, by name, by their or either of their order, or for their or either of their use.

2. Also set forth the respective amounts of the said testator's funeral and testamentary expenses, and of his debts and the several particulars thereof respectively, and the several amounts paid by the defendants, or either and which of them, for or in respect of the funeral and testamentary expenses of the said testator, and of his debts respectively.

3. Set forth an account of all and every the sum and sums of money paid, and when and by whom and to whom, for or in respect of the several legacies bequeathed by the will of the testator.

4. Set forth the amount of the clear residue of the said testator's personal estate, and how the same and every part thereof is invested, and in whose hands the same and each and every or any part thereof is.

5. Set forth whether the debts due to the said testator, or any and which of them, or any other and what part or parts of his personal estate are or is unreceived, unenumerated, or outstanding, and how and upon what security or securities, and why have the same debts and such other personal estate not been respectively received, converted, or gotten in.

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116. *As to real and leasehold estates.*

1. Set forth a full, true, and particular account of all the freehold and leasehold estates, of or to which the said testator was seized, possessed, or entitled, or over or in respect of which he had any disposing power or beneficial interest at the time of his death, and in whose possession or occupation and at what rent or rents the same and every part thereof have or has been since the death of the said testator; and a like account of all and every the sum and sums of money which have or hath been received by the defendants — and —, or either and which of them, or by any person or persons by their or either and which of their order, or for their or either and which of their use, for and in respect of the rents and profits of the said testator's freehold and leasehold estates respectively since the death of the said testator, and when and by and from whom received, and in respect of what particular estate or estates or property, and for what rent and when due, and for what parts of the said testator's estates, all and every such sums were respectively received; and set forth how and in what manner the same sums and every of them have or hath been applied or disposed of, and what is the balance in the hands of the defendants, or either and which of them.

2. Set forth a like account of the several freehold and leasehold estates which have been sold or disposed of, and when and by and to whom, and for what sum or sums of money, and when and from whom all and every or

any of such sum or sums of money hath or have been received by or come to the hands of the said — and —, or by any person or persons by their or either and which of their order, or for their or either and which of their use; and set forth whether and which of the said estates respectively of the said testator remain unsold and undisposed of, and why, and what is the value thereof respectively.

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117. *Interrogatories to a bill by a purchaser against a vendor for specific performance of a contract for sale of a freehold estate.*

1. Whether he [the vendor] was not seized and possessed of, or otherwise well entitled unto, the said freehold messuage or tenement, with the out-buildings, pleasure-grounds, pasture-lands, and other the appurtenances thereto adjoining or belonging, and the inheritance in fee simple thereof? and

2. Whether, being so seized and entitled as aforesaid, he did not, at the time hereinbefore in that behalf mentioned, or at some other and what time, cause all the said estate and hereditaments to be put up to sale by public auction by the said Mr. W., at —, in three lots, pursuant to printed particulars and conditions of sale previously advertised and published thereof? and

3. Whether the said premises were not bought in by him the said defendant at the time of the said sale, or how otherwise? and

4. Whether your orator did not, in or about the said month of April, or when else, enter into a treaty with the said defendant for the absolute purchase of the same estate and premises, together with the timber and other trees, fixtures and other effects, in and about the same, discharged from all incumbrances, at or for the price or sum of \$——, or at some other and at what price? and

5. Whether the said defendant did not agree to accept the said sum of \$—— as the consideration for the said estate and premises? and

6. Whether thereupon such agreement in writing of such date, or of or to such purport and effect as hereinbefore in that behalf mentioned, was not duly entered into and signed by the respective solicitors for your orator and the said defendant, in the name and on the behalf of your orator and the said defendant, or how otherwise? and

7. Whether your orator did not, previously to the signing of the said agreement, pay the said defendant the sum of \$——, as a deposit, and in part of his said purchase-money, or sum of \$——? and

8. Whether the said defendant hath not since delivered up possession of the said purchased premises to your orator? and

9. Whether your orator hath not always been ready and willing to per-

form his part of the said agreement, and, on having a good and marketable title shown to the said estate and premises, and a conveyance of the fee-simple thereof, discharged of all incumbrances, made to him, to pay the residue of said purchase-money or sum of \$ —— to the said defendant? and

10. Whether the said defendant doth not, and why, refuse to perform his part of the said agreement? and

11. Whether the said defendant is not able to make a good and marketable title to the said estate and premises, and if not, why not? and

12. Whether he doth not, and why, decline or refuse to make a good and marketable title to the said premises? and

13. Whether your orator hath not required him so to do, and made such offer to him as in that behalf aforesaid, or to that or the like or some and what other purport or effect? and

14. Whether the whole of the residue of the purchase-money of the said premises hath not been ready and unproductive in the hands of your orator, for the purpose of completing said purchase, from the time the same ought to have been completed by the terms of said agreement, or from some and what other time?

## PART II.

### FORMS OF THE VARIOUS MODES OF DEFENCE TO SUITS IN EQUITY.

#### CHAPTER VII.

##### DEMURRERS.

###### 1. *Title and commencement.*

The demurrer of C. D., defendant, to the bill of complaint of  
A. B., the above-named plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer sheweth that &c. [*Here set forth the cause of demurrer.*]

###### 2. *Conclusion.*

Wherefore and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this Court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

A. B.

[*Counsel's name.*]

###### 3. *Demurrer for want of equity.*

[*Title and commencement as before.*]

*Cause of demurrer.*] That the plaintiff hath not in and by his said bill made or stated such a case as entitles him, in a Court of Equity, to any discovery from this defendant [*or these defendants or either of them*] or

to any relief against him [*or them or either of them*] as to the matters contained in the said bill or any of such matters. Wherefore<sup>1</sup> &c.

4. *Form of Demurrer prescribed in Chancery Rules of New Hampshire.*

In the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. & a.

The demurrer of T. D.

The said T. D. says that the plaintiff is not entitled upon said bill to the relief he prays for, because he had a plain and adequate remedy at law, and because &c.

T. D., by

A. T., *his Solicitor.*

5. *Demurrer for multifariousness.*

The demurrer of &c.

This defendant, by protestation, &c., doth demur, and for cause of demurrer sheweth, that it appears by the said bill that the same is exhibited against the defendant and the several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested, or concerned, and that the said bill is altogether multifarious. Wherefore<sup>2</sup> &c.

6. *Demurrer and answer.*<sup>3</sup>

The joint and several demurrer of W. L. and J. L. to *part*,<sup>4</sup> and the joint and several answer of the same defendants to the *residue*, of the original bill of complaint of T. A. P. and J. B., plaintiffs.

These defendants, to so much of the plaintiffs' bill as prays that they may be decreed to transfer to the said plaintiffs, as the executors of G. M. in the said bill mentioned, the 21-64th shares of the ship called &c., in the said bill mentioned, and that the said defendant J. L. may be decreed to transfer to the plaintiffs the 21-64th shares of the brig or vessel called &c., in

<sup>1</sup> Leave to correct a clerical error in demurrer granted, time for demurring not having expired. *Richardson v. Hastings*, 7 Beav. 58. Demurrer must state some cause arising out of the bill, but must not introduce a material fact. See *Wood v. Midegley*, 5 De G., M. & G. 41; 23 L. J. Ch. 553.

<sup>2</sup> See *Rump v. Greenhill*, 1 Jur. N. S. 123, R.; 20 Beav. 512; *Pictou v. Lockett*, by the Vice-Chancellor of England, April, 1837, MSS.

<sup>3</sup> For form of plea and demurrer, see *Carter v. Treadwell*, 3 Story C. C. 42, 43, 44.

<sup>4</sup> It is submitted that this is the correct form, notwithstanding what is said in the report of *Osborne v. Jullion*, 3 Drew, 552; 4 W. R. 663. And see as to form of plea and demurrer, *Barnes v. Taylor*, 4 W. R. 577.

the said bill mentioned, and to so much of the said bill as prays that an account may be decreed to be taken of all the dealings and transactions between these defendants and the said G. M., with respect or in relation to the said two vessels, and of all sums of money respectively received and paid by these defendants and the said G. M. respectively, or by any other person by their or any of their respective order, or for their or any of their use, and that these defendants should be decreed to pay what should be found due thereon, so far as such dealings and transactions and sums of money, or any or either of them, relate to or concern the said 21-64th shares of the said vessel called &c., or the said 21-64th shares of the said vessel called &c., and the freights or freight, or any shares or share of the freights or freight, of such vessels or either of them, and to so much of the said bill as prays further or other relief with respect or in relation to the said shares of the said two vessels respectively or the freight thereof respectively.

*Cause of demurrer.*] These defendants do demur and for cause of demurrer show, that the said plaintiffs have not made or stated such a case as entitles them in a Court of Equity to the relief so prayed for, or any part thereof; and these defendants humbly pray the judgment of the Court as to such parts of the bill as they have so demurred to as aforesaid.

*Answer to residue of bill.*] And as to the residue of the said bill, that is to say, all the discovery, and the rest of the relief, by the said bill prayed, these defendants for answer thereto severally say, they admit it to be true that Messrs. C. & N. were, in the month of &c., engaged in building at Liverpool, on their own account, a certain brig or vessel, and that in the month of &c., these defendants W. L. and J. L. did carry on business together in partnership as wine merchants and general dealers,<sup>1</sup> &c., &c.

#### 7. *Demurrer for want of parties.*

##### [*Title and commencement.*]

And for [further] cause of demurrer show, that there are not proper parties to the said information, and that there is not and are not any person or persons, party or parties,<sup>2</sup> to the said information who represents or rep-

<sup>1</sup> In this case, the demurrer extended too far, in demurring to the relief sought in respect of the freight of the vessels as well as the transfer of them, and it was held that, consistently with the law as to the registration of vessels, one person might be the legal owner of a ship while another person was entitled in equity to the freight. *Picton v. Lockett*, V. C. E., April, 1837, MSS. See, also, *Devanport v. Whitmore*, 2 My. & Cr. 177; *Armstrong v. Armstrong*, 21 Beav. 78. As to form of demurrer and answer, see ante, Vol. I. pp. 442, 474.

<sup>2</sup> If the absent parties are necessary for any part of the relief prayed by the bill, it is an objection on demurrer. Per Lord Cottenham L. C., *Penny v. Watts*, 2 Phil. 152.

resent, or has or have a common interest with the persons or class of persons whose interests the said information affects to protect, or for whom relief is thereby prayed.<sup>1</sup> Wherefore &c.

8. *Another form of demurrer for want of parties.*

The demurrer of &c.

These defendants by protestation, &c., do demur to the said bill, and for cause of demurrer show that it appears by the said plaintiff's said bill that a personal representative of R. S., the testator therein named, resident within the jurisdiction of the Court, is a necessary party to the said bill, and yet that there is no personal representative of the said testator resident within the jurisdiction of the Court a party to the said bill. Wherefore &c.

9. *Demurrer to a bill exhibited by an infant, where no next friend is named.*

[ *Title and commencement.* ]

That the said plaintiff, who appears by his said bill to be an infant under the age of twenty-one years, has exhibited his said bill without any person being therein named as his next friend. Wherefore &c. [ *Conclusion.* ]

10. *Demurrer to a bill where a plaintiff claimed under a will, and it was apparent on the face of the bill that he had no title.*

[ *Title and commencement.* ]

That the said plaintiff has not, as appears by his said bill, made out any title to the relief thereby prayed. Wherefore &c. [ *Conclusion.* ]

11. *Demurrer to a bill of interpleader, for want of the necessary affidavit, and for want of equity.*

The demurrer of &c.

This defendant by protestation, &c., doth demur in law to the said bill, and for cause of demurrer sheweth that, although the said plaintiff's said bill is upon the face thereof a bill of interpleader, yet the said plaintiff has not annexed to his said bill an affidavit that he doth not collude concerning such matters with any of the defendants thereto, which affidavit ought, according to the rules of this Court, as this defendant is advised, to have

<sup>1</sup> See *The Attorney-General v. The Corporation of Poole*, 2 Keen, 190; *S. C. on appeal*, 4 My. & Cr. 17; *Hammond v. Messenger*, 9 Sim. 238.

been made by the said plaintiff and annexed to the said bill; and for further cause of demurrer this defendant further sheweth that the said bill does not contain sufficient matter of Equity whereupon this Court can ground any decree in favor of the said plaintiff, or give the said plaintiff any relief against this defendant. Wherefore &c.

12. *Demurrer to a bill of interpleader, because it does not show any claim of right in the defendant.*

The demurrer of &c.

This defendant, by protestation, &c., doth demur, and for cause of demurrer sheweth, that the plaintiff has not in his said bill of interpleader shown any claim or right, title, or interest whatsoever in this defendant in or to the said estate called A., in the said bill particularly mentioned and described, in respect whereof this defendant ought to be compelled to interplead with C. D., in the said bill named, and the other defendant thereto. Wherefore &c.

13. *Demurrer to a bill for relief on a lost bond, for want of an affidavit of such loss being annexed to and filed with the bill.*

[ *Title and commencement.* ]

That the said plaintiff by his said bill, as this defendant is advised, endeavors to entitle himself to a sum of money due upon the bond, therein stated to have been entered into by this defendant to the said plaintiff, and suggests for equity, that the said bond has been burnt, lost, or destroyed; and the said plaintiff has not by affidavit, annexed to and filed with the said bill, made oath that the said bond is burnt, lost, or destroyed. Wherefore &c. [ *Conclusion.* ]

14. *Demurrer to a bill for relief against a mandamus.*

[ *Title and commencement.* ]

As to so much and such part of the said plaintiff's bill as prays an injunction, or order in the nature of an injunction, to stay proceedings on the writ of *mandamus*, issued to compel the said plaintiff to hold a Court, and admit these defendants respectively as tenants thereto, these defendants severally demur, and for cause of demurrer show, that it is against the course and practice, and not within the jurisdiction of this Court, to interfere or afford relief against the said writ of *mandamus*, or any other proceeding of a criminal or mandatory nature. Wherefore &c. [ *Conclusion.* ]

15. *Demurrer to a bill to restrain a private nuisance, the plaintiff not having established his right at law.*

[ *Title and commencement.* ]

That the plaintiff has not, by his said bill, shown such a case as entitles him to such relief as is thereby prayed, inasmuch as it does not thereby appear that there was any impediment to an action at law being brought by the said plaintiff to ascertain his right and that of this defendant, relative to the wall in the said bill particularly mentioned, or that in any trial or action verdict or judgment has been hitherto obtained by the said plaintiff for that purpose, or that there was previously to or at the time the said bill was filed, or now is, any authentic record of such right. Wherefore &c. [ *Conclusion.* ]

16. *Demurrer, for want of privity, to a bill by an unsatisfied legatee against a debtor of his testator.*

[ *Title and commencement.* ]

That it appears by the said plaintiff's said bill, that there is no privity between the said plaintiff and this defendant, to enable the said plaintiff to call on this defendant for payment of any debt due to the estate of the said testator from this defendant. Wherefore &c. [ *Conclusion.* ]

17. *Demurrer by an arbitrator made party to a bill to impeach his award.*

[ *Title and commencement.* ]

For that the said plaintiff has not, by his said bill, which seeks to set aside the award therein set forth, and to which this defendant is made a party in his character of an arbitrator, shown that he can have any decree against this defendant, whose answer could not be read as evidence against the other defendants to the said bill, or any of them ; and the said plaintiff, for anything that appears in the said bill to the contrary, might examine this defendant as a witness in the suit. Wherefore &c. [ *Conclusion.* ]

18. *Demurrer to a bill brought against a defendant by a judgment creditor who had not sued out execution, for a discovery of goods of the debtor, alleged to have been fraudulently possessed by the defendant.*

[ *Title and commencement.* ]

That the said plaintiff has not alleged, nor does it appear by his said bill

that he has sued out execution, and actually taken out a *fieri facias* on his said judgment, and that until he has so done the goods of A. B. in the said bill named are not bound by the said judgment, nor the said plaintiff entitled to a discovery thereof. Wherefore &c. [*Conclusion.*]

19. *Demurrer where a discovery would subject the defendant to pains and penalties and forfeitures.*

[*Title and commencement.*]

That the said information seeks to discover how this defendant came by the possession of the several goods therein particularly mentioned, whether it was not by fraud, violence, contrivance, or other means, &c., &c., but this defendant is advised, that any discovery of the manner in which such goods came into this defendant's possession, as an officer of the honorable united company of merchants trading to the East Indies, would or might subject this defendant to fine, or corporal punishment, and the penalties contained in the several acts of Parliament for the establishment of the said company, and also to a forfeiture of his rank and office in the service of the said company, and likewise of the said goods. Wherefore &c. [*Conclusion.*]

20. *Demurrer to a bill of review and supplemental bill, on the ground that there are no errors in the decree, and that the leave of the Court was not first obtained.*

These defendants by protestation, &c., do demur in law thereto, and for cause of demurrer show, that there are no errors in the record and premises, and in the decree of the — day of —, in the said bill of review and supplemental bill mentioned, nor is there any sufficient matter alleged in the said bill of review and supplemental bill, to entitle the said plaintiff to reverse the said decree; and for divers other defects and errors appearing in the said bill of review and supplemental bill, these defendants do demur in law thereto; and these defendants, for further cause of demurrer, humbly show, that, under the rules of this honorable Court, no supplemental or new bill in the nature of a bill of review, grounded upon any new matter discovered or pretended to be discovered since the pronouncing of any decree of this Court, in order to the reversing or varying of such decree, shall be exhibited without the special leave of the Court first obtained for that purpose; wherefore, and for that the said plaintiff does not allege by the said bill of review and supplemental or new bill that he had first obtained leave of this Court for exhibiting the said bill of review and supplemental or new bill, these defendants demur in law thereto, and humbly

pray the judgment of the Court, whether they ought to be compelled to put in any further or other answer to the said plaintiff's said bill of review and supplemental or new bill, and humbly pray to be hence dismissed with their reasonable costs in this behalf, most wrongfully sustained.<sup>1</sup>

## CHAPTER VIII.

### PLEAS.

#### 1. *Title and commencement of plea.*<sup>2</sup>

The plea of —, defendant [*or of —, defendants*], to the bill of complaint of —, complainants [*or the joint and several plea of A. B. and C. D., defendants &c.*].

This defendant [*or these defendants*], by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of the said bill, or to so much and such part of the said bill as prays, &c., or seeks a discovery from this defendant [*or these defendants*], whether, &c., saith [*or say*] that, &c.

#### 2. *Conclusion.*

All which matters and things this defendant doth aver [*or these defendants do aver*] to be true, and he pleads [*or they plead*] the said [*statute or release, &c., as the case may be (in bar)*] to the said plaintiff's bill [*or if the plea extend to part only, to so much of the said bill as hereinbefore particularly mentioned*], and prays [*or pray*] the judgment of this honorable Court, whether he [*or they*] should be compelled [*or ought to be required*] to make any other or further answer to the said bill [*or to so much of the said bill as is hereinbefore pleaded to*], and prays [*or pray*] to be hence dismissed with his [*or their*] costs and charge in that behalf, most wrongfully sustained.

[*Counsel's signature.*]

#### 3. *Plea to part, and answer to residue of bill.*<sup>3</sup>

The plea of —, defendant [*or one of the defendants*], to part, and

<sup>1</sup> Ante, Vol. II. p. 1612.

<sup>2</sup> See ante, Vol. I. p. 704.

<sup>3</sup> For form of plea to part and demurrer to the residue of a bill in which plaintiff alleged himself to sue as administrator of a deceased person and also in his own private

the answer of the same defendant to the residue, of the bill of complaint of —, plaintiff [*or the joint plea and answer, or the joint and several plea and answer, according to circumstances*].

This defendant, to all the relief sought by the said bill, and also to all the discovery thereby sought, except the discovery sought by or in respect of [so much of the said bill as prays that this defendant may answer and set forth] whether, &c. [*here the language of the interrogatories which it is necessary to answer, must be introduced*], this defendant does plead in bar, and for plea saith &c. [*here follows the plea*].

All which matters and things this defendant does aver to be true, and does plead the same in bar to the whole of the said bill, except such part of the discovery thereby sought as aforesaid; and this defendant humbly prays the judgment of this honorable Court, whether he ought to be compelled to make any further or other answer to so much of the said bill as is hereby pleaded to, and he prays to be hence dismissed with his costs.

*And for answer* to such parts of the said bill as are excepted, this defendant says, that &c.<sup>1</sup> [*here the answer follows.*]

[*Counsel's signature.*]

capacity, the plea denying that he was administrator and the demurrer being that the bill showed no right to discovery or relief in his private capacity, see *Carter v. Treadwell*, 3 Story C. C. 42, 43, 44.

<sup>1</sup> See Mitf. Pl. pp. 257, 329; ante, Vol. I. p. 493.

If the bill is demurable, the defendant should demur and not plead. *Billing v. Flight*, 1 Mad. 230.

*As to plea of stated account and release.* If error or fraud is charged by the bill, it must be denied by the plea as well as answered in support of the plea. See as to form of the plea, *Phelps v. Sproule*, 1 M. & K. 231; *Holland v. Sproule*, 6 Sim. 623; *Parker v. Alcock*, 1 Y. & J. 432; *Attorney-General v. Brookshank*, 1 Y. & J. 439.

*As to plea of adverse possession.* *Hardman v. Ellames*, 5 Sim. 640; 2 My. & K. 732.

*As to plea stating descent to heir at law*, see *Wood v. Skelton*, 6 Sim. 176.

The Statute of Frauds is generally taken advantage of by demurrer or answer. See *Walker v. Locke*, 5 Cush. 90, 93.

*As to plea of the Statute of Limitations*, in case of a bill for an account, see *Forbes v. Skelton*, 8 Sim. 335; *Inglis v. Haigh*, 8 Mees. & W. 769; *Cottam v. Partridge*, 4 Scott N. R. 819. In case of a bill of foreclosure and plea of 3 & 4 Will. 4, c. 27, s. 40. See *Dearman v. Wyche*, 9 Sim. 573, and for form of plea and answer, ib. 579.

*As to plea of purchase for valuable consideration.* See *Pennington v. Beechey*, 2 Sim. & St. 282; *Jackson v. Rowe*, 5 Russ. 514; S. C. 2 Sim. & St. 472; *Lord Portarlington v. Soulby*, 6 Sim. 356.

*As to plea being supported by an answer.* See ante, Vol. I. p. 502; *Sanders v. King*, 6 Mad. 61; *Emerson v. Harland*, 3 Sim. 490; 2 Cl. & Fin. 10; *Foley v. Hill*, 3 M. & C. 475; *Denys v. Locock*, 3 M. & C. 205.

*As to pleading double.* See *Kay v. Marshall*, 1 Keen, 190.

## I. PLEAS TO THE PERSON.

4. *Plea that the plaintiff is an alien enemy.*[ *Title and commencement as before.* ]

That the said plaintiff A. B. is an alien, born of foreign parents, and in foreign parts, that is to say, at Calais, in the Kingdom of France, and out of the allegiance of *our said Lord* the King, and under the allegiance of the said King of France, who is an enemy to our said lord the King, and to whom the parents of the said plaintiff adhere; and the said plaintiff also before and at the time of filing his said bill was, and now is, an enemy to our said lord the King, and entered into these dominions without the safe-conduct of our said lord the King, and has not been made a subject of our said lord the King by naturalization, denization, or otherwise. Therefore &c. ( *Conclude as above.* )

5. *Plea of infancy to a bill exhibited without a prochien amy.*[ *Title and commencement as before.* ]

That the said plaintiff, before and at the time of filing his said bill in which he appears as the sole plaintiff, was, and now is, an infant under the age of twenty-one years; that is to say, of the age of — or thereabouts. Therefore &c. ( *Conclude as above.* )

6. *Plea of coverture of the plaintiff.*[ *Title and commencement as before.* ]

That the said plaintiff A. B., before and at the time of exhibiting her said bill, was, and now is, under coverture of one C. D., her husband, who is still living, and in every respect capable, if necessary, of instituting any suit at law, or in equity in this —, on her behalf. Therefore &c. ( *Conclude as before.* )

7. *Plea of lunacy.*[ *Title and commencement as before.* ]

That the said plaintiff, who by himself alone attempts to sustain an injunction in this suit, before and at the time of filing his said bill, was duly found and declared to be a lunatic, under and by virtue of a commission of lunacy, duly awarded and issued against him, as by the inquisition thereon, (a true copy whereof is now in this defendant's possession, and ready to be produced to this honorable Court,) to which this defendant craves

leave to refer, will more fully appear ; and which said commission has not hitherto been superseded, and still remains in full force and effect ; and the said A. B. therein named, and the said plaintiff is, as this defendant avers, one and the same person, and are not other and different persons. Therefore &c. (*Conclude as above.*)

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II. THAT THE PLAINTIFF IS NOT THE PERSON HE PRETENDS TO BE, OR DOES NOT SUSTAIN THE CHARACTER HE ASSUMES.<sup>1</sup>

8. *Plea, that the supposed intestate is living, to a bill where the plaintiff entitled himself as administrator.*

[*Title and commencement as before.*]

That the said A. S., in the said bill named, (to whom the said plaintiff alleges that he has obtained letters of administration, and by virtue of which letters of administration, and also under the pretence of his being the heir-at-law of the said A. S., the said plaintiff has commenced and prosecuted this suit,) was at the time the said plaintiff filed his said bill, and still is, alive at Paris, in the Kingdom of France. Therefore this defendant demands the judgment of this honorable Court, whether he shall be compelled to answer the plaintiff's bill ; and humbly prays to be dismissed with his reasonable costs on this behalf sustained.

9. *Plea that plaintiff is not administrator, as he alleges himself to be, of a person deceased.*

[*Title &c., as before.*]

These defendants, by protestation, &c., to the matter in said bill contained, and to so much thereof as sets forth that said E. C. is the administrator of the estate of said S. R. A., and to so much thereof as relates to any contract of purchase between said S. R. A. and these defendants, and seeks to have such contract rescinded, and prays for relief in the premises, and that these defendants may be required to refund to said E. C. all the money paid by S. R. A. upon the said purchase, and that the notes given in payment therefor may be given up to be cancelled, and that the plaintiff may be repaid all damages and expenses which said S. R. A. may have suffered by reason of the premises, do thereunto plead, and for plea say, that said E. C. is not administrator as in the bill mentioned, or the legal representative of said S. R. A., duly appointed and qualified to act as therein set forth. All which matters and things these defendants aver to

<sup>1</sup> See *Carter v. Treadwell*, 3 Story C. C. 42, 43.

be true, and plead the same to so much of said bill as aforesaid, and pray judgment of this honorable Court, whether they ought to be required to make any other or further answer thereunto.

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III. THAT THE DEFENDANT HAS NOT AN INTEREST IN THE SUBJECT THAT CAN MAKE HIM LIABLE TO DEMANDS OF THE PLAINTIFF.

10. *Plea that the defendant has no interest in the subject of the suit.*

[*Title and commencement as above.*]

As to so much of and such parts of the plaintiff's bill as charges that this defendant is interested in the personal estate of A. B., the testator in the said bill named, and seeks an account of the said testator's personal estate; this defendant pleads thereto, and for plea saith, that he is merely a subscribing witness to said testator's will, and in no wise interested therein; and this defendant avers that he has not, nor ever had, or pretended to have, nor does he, or did he ever claim any right, title, or interest whatsoever in the personal estate of the said testator, or any part thereof, and that the said plaintiff has no right to institute this, or any other suit against him in respect thereof. All which said matters and things this defendant doth aver and plead in bar to so much of the said plaintiff's bill as hereinbefore particularly mentioned and pleaded to. And this defendant, not waiving his said plea, but relying thereon, and for better supporting the same, for answer to so much of the said bill as aforesaid, saith he denies that he now is, or ever was, interested in the personal estate of the said testator or any part thereof.

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IV. THAT THE DEFENDANT IS NOT THE PERSON HE IS ALLEGED TO BE, OR DOES NOT SUSTAIN THE CHARACTER HE IS ALLEGED TO BE.

11. *Plea that the defendant never was administrator.*

[*Title and commencement as above.*]

That he is not, nor ever has been, administrator of the goods, or estate which were of the said E. F. deceased, in the said bill named, as the said plaintiff in his said bill has untruly alleged. Wherefore &c. (*Conclude as above.*)

12. *Plea to a bill of Revivor against the administrators of the original defendant, deceased, that the defendant never was appointed executor or administrator of the deceased in the State where the suit is sought to be revived against him as such.*

[*Title and commencement as before.*]

That the said W. D. M. H. [*the original defendant*] at the time of his decease, was a citizen of and resident in the State of C., and that his last will and testament was duly proved and allowed in the county of S. F., in the said State of C.; and that this defendant was named as one of the executors thereof, and duly appointed as such by the said Court of Probate, and that this defendant has not been appointed an executor of the said will, or an administrator upon the estate of the said W. D. M. H., by any Court of Probate or other Court in the State of M.; that at the time when service of the plaintiff's bill was made upon him, he was, and has since continued to be, a citizen of the said State of C., that he was then casually within said State of M., and for a temporary purpose only, and at that time had no assets of the estate of the said W. D. M. H. in his possession or under his control. All which matters and things this defendant doth aver to be true, and pleads the same to the said bill of revivor, and demands the judgment of this honorable Court whether he ought to be compelled to make any answer thereto, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

H. F. T.

[*Jurat.*]

[Held a good plea in *Mellus v. Thompson et al.* U. States C. Court, for Mass., 1857.]<sup>1</sup>

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#### PLEAS IN BAR.

V. THAT FOR SOME REASON, FOUNDED ON THE SUBSTANCE OF THE CASE, THE PLAINTIFF IS NOT ENTITLED TO RELIEF.

13. *Plea of a decree, as of record in a Court of Equity.*

[*Title and commencement as above.*]

As to so much and such part of the said plaintiff's bill as seeks to compel this defendant either to admit assets of his late father I. M., deceased, came to his hands, sufficient to answer and satisfy the said plaintiff's demand in the said bill mentioned, or to set forth a full and perfect inventory and account of all the personal estate of his this defendant's said father,

<sup>1</sup> See *Beaman v. Elliot*, 10 Cush., 172.

come to the hands of this defendant, or to the hands of any other person or persons for his use, with the nature, kind, and value thereof, and of every part thereof, and of all sums of money come to the hands of this defendant, or any other person or persons for his use, for or on account of the real estates of this defendant's said father, or the rents or profits thereof, (charged with the several legacies in the said testator's will, and in the said bill also mentioned to be given and bequeathed to and for the younger children of the said testator in the said will, and in the said bill also respectively named); and also to set forth the annual value of such real estates; or that this defendant may thereout pay to the said plaintiff the sum of \$——, in the said plaintiff's bill mentioned, with interest for the same, from the time of the said testator's death; this defendant doth plead thereto, and for plea, saith, that at the term of —— in the year ——, M. M., since deceased, together with P. M., deceased, and late the wife of the said plaintiff, and S. M. and H. M. respectively, infants, by the said M. M., their sister and next friend, (and which said M. M., P. M., the said plaintiff's late wife, S. M. and H. M., were the daughters and younger son of the testator I. M., all since deceased,) exhibited their bill of complaint in this honorable Court, against E. P. and R. T. Esqs., (both since deceased,) and this defendant, as eldest son and heir-at-law of the said testator, I. M. thereby stating &c. &c., and praying that the legacies given and bequeathed by the said testator in and by his said will, to the said plaintiff M. M., as one of the younger children, might be paid, and the legacies or shares of the rest of such younger children, all of whom were infants, might be properly secured for their benefit, and a suitable allowance made thereout for their maintenance and education during their respective minorities, to which said bill this defendant, who was then an infant, put in his answer by A. B., his guardian, and the said other defendants respectively also put in their answers thereto, and submitted to this honorable Court, what right and interest the said plaintiff M. M. was entitled to under her said father's will, and the said cause afterwards, and on or about the —— day of ——, came on to be heard, and a decree was then pronounced therein whereby it was referred to C. D., Esq., then one of the Masters of this honorable Court, to take an account of certain stock, which the said testator by his said will had given and bequeathed among and to his children, and the usual accounts of personal estate, funeral and testamentary expenses, and debts of the said testator, and an account of the rents and profits of the said testator's real estates were thereby directed, and which said decree was afterwards, and on or about ——, duly signed and enrolled; and the said Master afterwards, in pursuance of the said decree, took the said accounts, and by his report, bearing date the —— day of ——, which was afterwards confirmed, stated &c. [*all that was done by the Master*], and the said share so reported due to the said P. M., since deceased, was afterwards,

in pursuance of an order of this honorable Court, since her marriage with the said plaintiff in the present suit, on or about — day of —, duly assigned and transferred to, and accepted by him, in full satisfaction and discharge of all the right and interest which his said wife, or the said plaintiff in this suit in her right, or either of them, had, or could have, in or to the personal estate of the said testator, or any part thereof; all which matters and things this defendant doth aver and plead in bar to so much of the said plaintiff's bill as hereinbefore particularly mentioned; and prays judgment of this honorable Court, whether he should make any further answer to so much of the said bill as is hereinbefore pleaded to.

14. *Plea of former suit depending.*<sup>1</sup>

[*Title and commencement as above.*]

That at a term of the — Court —, which was held in the year — the said present plaintiff exhibited his bill of complaint in this honorable Court against this defendant and one L. Y., for an account of the money raised by the sale of the plantations and other estates in the said plaintiff's present bill mentioned, and claiming such shares and proportions thereof and such rights and interests therein, as he now claims by his present bill: and praying relief against this defendant in the same manner, and for the same matters, and to the same effect as the said plaintiff now prays by his said present bill; and this defendant and the said L. Y. appeared and put in their answer to the said former bill, and the said plaintiff replied thereto, and witnesses were examined on both sides, and their depositions duly published, and the said former bill and the several proceedings in the said former cause, as this defendant avers, now remain depending, and as of record in this honorable Court, the said cause being yet undetermined and undismitted, all which several matters and things this defendant doth aver and pleads the said former bill, answer, and the several proceedings in the said former suit, in bar to the said plaintiff's present bill; and humbly demands the judgment of this honorable Court, whether he shall be put to make any further or other answer thereto; and prays to be hence discharged with his costs and charges in this behalf sustained.

<sup>1</sup> See *Jenkins v. Eldredge*, 3 Story C. C. 181.

## VI. PLEAS IN BAR, OF MATTER IN PAIS.

15. *Plea of stated account.*[*Title and commencement as above.*]

As to so much and such parts of the said plaintiff's bill as seeks an account of and concerning the dealings and transactions therein alleged to have taken place between the said plaintiff and this defendant, at any time before the — day of —, in the year —, this defendant for plea thereto saith, that on the — day of —, which was previously to the said bill of complaint being filed, the said plaintiff and this defendant did make up, state, and settle an account in *writing*, a counterpart whereof was then delivered to the said plaintiff, of all sums of money which this defendant had before that time, by the order and direction, and for the use of the said plaintiff received, and of all matters and things thereunto relating, or at any time before the said — day of —, being or depending between the said plaintiff and this defendant, (and in respect whereof the said plaintiff's bill of complaint has been since filed;) and the said plaintiff, after a strict examination of the said account, and every item and particular thereof, which this defendant avers according to his best knowledge and belief to be true and just, did approve and allow the same, and actually received from this defendant the sum of \$ —, the balance of the said account, which by the said account appeared to be justly due to him from this defendant; and the said plaintiff thereupon, and on the — day of —, gave to this defendant a receipt, or acquittance for the same, under his hand, in full of all demands, and which said receipt or acquittance is in the words and figures following, (that is to say) (*here state the receipt verbatim,*) as by the said receipt or acquittance, now in the possession of this defendant, and ready to be produced to this honorable Court, will appear. Therefore &c. (*conclude as above.*)

16. *Conclusion of plea of release.*

Therefore this defendant pleads the said release in bar to so much of the said plaintiff's bill as is hereinbefore particularly mentioned, and humbly prays the judgment of this honorable Court, whether he ought to be compelled to make any further answer to so much of the said bill as is before pleaded unto; and this defendant, not waiving the said plea, but insisting thereon for answer to the residue of the said bill, and in support of his said plea saith, he denies that the said release was unduly obtained by this defendant from the said plaintiff, or that the said plaintiff was ignorant of the nature and effect of such release, or that the consideration paid by this

defendant to induce the said plaintiff to execute the same, was at all inadequate to the just claims and demands of the said plaintiff against this defendant, in respect of the several dealings and transactions in the said bill mentioned, or any of them ; and this defendant denies, &c.

### 17. *Plea of a will.*

[*Title and commencement as above.*]

As to so much and such part of the plaintiff's bill as seeks [*that a receiver may be forthwith appointed to receive the rents and profits of the real estates, late of John Thompson, deceased, in the said bill named, and now in the possession of this defendant,*] and that this defendant may account with the said plaintiff for the rents and profits thereof, and that this defendant may be restrained by the order and injunction of this honorable Court from felling &c., timber &c., growing thereon, or which seeks to set aside the will of the said John Thompson, or which seeks any relief relative thereto, this defendant doth plead thereto, and for plea saith, that the said John Thompson, being before, and at the time of making his will, seized to him and his heirs, of and in divers parcels of real estate, in the several counties of —, of the yearly value of \$ —, or thereabouts, and being of sound mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the — day of —, which was duly executed and attested, and thereby gave &c., [*setting forth the will, under which the defendant had an estate for life in the testator's real estate, with remainder &c., and that the testator appointed the defendant executor of his said will,*] and the said John Thompson being so seized or entitled as aforesaid, died on the — day of —, without having altered or revoked his said will ; and this defendant, soon after the death of the said testator, entered on the said real estates devised to him in manner aforesaid, and has ever since been in the enjoyment or receipt of the rents and profits thereof. Therefore &c. (*conclude as above*).

### 18. *Circumstances bringing a case within the protection of a statute ; viz. the Statute of Limitations or the Statute of Frauds.*<sup>1</sup>

[*Title and commencement as above.*]

As to so much of the bill as seeks an account and discovery of the estate and effects of H. C., Esq., deceased, this defendant's testator, or that seeks a satisfaction for, or in respect of, any money received by the said

<sup>1</sup> If the want of a writing, where one is required by statute, appears on the face of a bill, the objection may be taken by demurrer. *Walker v. Locke*, 5 Cush. 90.

H. C., for or on account of I. G., in the said bill named, or for or on account of the said plaintiff; or that seeks a discovery of how many hogsheads of tobacco or rice, or any other commodities pretended to have been consigned to the said H. C., or that seeks a satisfaction for the same; or that seeks a discovery or satisfaction for any of the money, goods, or effects of the said I. G., come to the hands of this defendant, since the decease of the said H. C.; this defendant pleads thereto, and for plea saith, that the said I. G., under whom this defendant claims, departed this life in or about the year —, and that the said H. C., this defendant's testator, afterwards also departed this life, in the month of —, in the year —, and that the matters and effects pretended to have been received by the said H. C., or by this defendant, and the goods and commodities pretended to have been consigned, (if any sums of money, goods, or effects were received by the said H. C., or by this defendant, which this defendant does not admit,) were received by the said H. C., or by this defendant, above six years before this defendant was served with any process of this honorable Court, to answer the said bill, or any process whatsoever was sued against this defendant to account for the same; and that if the said plaintiff had any cause of action or suit against this defendant, or against the said H. C. for or concerning any of the said matters, which this defendant does not admit, that such cause of action or suit did accrue or arise within six years before the said bill was filed, or this defendant served with process; nor did this defendant, or his testator, at any time within six years before the said bill was exhibited, or process sued out against this defendant, promise or agree to come to any account, or to make satisfaction, or to pay any sum or sums of money, for or by reason of any of the said matters; and that by a certain act of — for the limitation of actions and suits at law, it was enacted &c., (*state the statute to be pleaded,*) and this defendant pleads the several matters aforesaid in bar to so much of the plaintiff's said demand as aforesaid, and prays the judgment of this honorable Court thereon; and this defendant for answer, &c.

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VII. THAT SUPPOSING THE PLAINTIFF ENTITLED TO THE ASSISTANCE OF THE COURT TO ASSERT A RIGHT, THE DEFENDANT IS EQUALLY ENTITLED TO THE PROTECTION OF THE COURT TO DEFEND HIS POSSESSION.

19. *Plea of purchase for a valuable consideration, without notice.*

This defendant by protestation &c., (*title and commencement as above*) as to so much of the said bill as seeks an account of what is due and owing to the said plaintiff, in respect of the annuity of \$ — therein

mentioned, and stated to be charged upon, and issuing out of the premises therein and hereinafter mentioned, this defendant doth plead thereto, and for plea saith, that A. B., previously to and on the — day of —, 18—, was, or pretended to be, seized in fee-simple, and was in, or pretended to be in, the actual possession of all those parcels of real estate, in the said bill mentioned and described, free from all incumbrances whatsoever; and this defendant, believing that the said A. B. was so seized and entitled, and that the said premises were in fact free from all incumbrances, on the — day of —, agreed with the said A. B. for the absolute purchase of the fee-simple and inheritance thereof; whereupon certain indentures of lease and release, bearing date respectively on &c., between the said A. B. of the one part, and this defendant of the other part, were duly made and executed; and by the said indenture of release the said A. B., in consideration of the sum of \$ — paid to him by this defendant, bargained, sold, released, and confirmed unto this defendant, all &c., [*set out the parcels verbatim from the deed,*] to hold unto, and to the use of this defendant, his heirs and assigns, forever; and in the said indenture of release is contained a covenant from the said A. B. with this defendant, that he, the said A. B., was absolutely seized of the said premises, and that the same and each of them and every part thereof were and was free from all incumbrances; as by the said indentures of lease and release respectively, reference being thereto had, will more fully appear; and this defendant doth aver, that the said sum of \$ —, the consideration money in said indenture of release mentioned, was actually paid by this defendant to the said A. B., at the time the said indenture of release bears date; and this defendant doth also aver, that at or before the respective times of the execution of the said indentures of lease and release, by the said A. B. and this defendant, and of the payment of the said purchase-money, he, this defendant, had no notice whatsoever of the said annuity of \$ —, now claimed by the said plaintiff, or of any other incumbrance whatsoever, that in anywise affected the said premises, so purchased by this defendant as aforesaid, or any of them, or any part thereof; and this defendant insists that he is a *bona fide* purchaser of the said premises for a good and valuable consideration, and without notice of the said annuity claimed by the plaintiff; all which matters and things this defendant doth aver and plead in bar to so much of the said plaintiff's bill as is hereinbefore particularly mentioned; and prays the judgment of this honorable Court, whether he should make any further answer to so much of the said bill as is hereinbefore pleaded to; and this defendant not waiving his said plea, but relying thereon, and for better supporting the same, for answer saith, that he had not at any time before, or at the time of purchasing the said premises, or since, until the said plaintiff's bill was filed, any notice whatsoever, either expressed or implied, of the said annuity of \$ —, claimed by the said plaintiff, or that the

same or any other incumbrance whatsoever was charged upon or in any wise affected the said premises so purchased as aforesaid, or any of them, or any part thereof; and this defendant denies, &c.

20. *A form of plea of purchaser for valuable consideration &c. prescribed by Chancery Rules of New Hampshire.*

IN THE SUPREME JUDICIAL COURT.

H—, ss.

T. P: v. T. D. and a.

The plea of T. M.

The said T. M. says that on the — day of —, 18—, he loaned to said T. D. the sum of \$ 600, and the said T. D., to secure the payment thereof, made and executed to him his promissory note of that date for \$ 600, and interest, in one year, and executed and delivered to him a good and sufficient deed of mortgage of said premises in said bill mentioned, with condition that if said T. D. should pay to this defendant said sum of \$ 600, and interest, in one year, the said deed should be void, as by the said deed duly executed, acknowledged, and recorded, and ready to be produced in said Court, appears.

And the said mortgage deed was duly recorded in the Registry of Deeds of said county of H., on the — day of —, 1850, and the alleged deed of mortgage made by said T. D. to the plaintiff was not left for record nor recorded in said Registry until the — day of —, 185—.

And this defendant avers that said sum of \$600 was paid by him to said T. D., in money, really and *bona fide*, and said deed of mortgage received and recorded, without notice of the plaintiff's pretended title set forth in the bill, and without any reason to believe or suspect that any such loan or mortgage of said premises to the plaintiff had been made.

T. M., by

A. D., *his Solicitor.*

VIII. THAT THE BILL IS DEFICIENT TO ANSWER THE PURPOSES OF COMPLETE JUSTICE.

21. *Plea of want of proper parties.*

[*Title and commencement.*]

As to so much of the said plaintiff's bill as seeks an account from this defendant, as executor and heir-at-law of H. E., Esq., deceased, in the said bill named, this defendant's late brother, for what remains due and owing upon the bond in the said bill mentioned, bearing date the — day of

——, in the year ——, and payment by this defendant as such executor and heir-at-law of the said H. E., deceased, as aforesaid, of what shall be found due on taking such account; this defendant doth plead thereto, and for plea saith, that no part of the sum of \$ —— for securing the repayment whereof the said bond was executed, was paid to, or received by the said H. E., but that the whole was paid unto A. W., in the said bond and in the said bill also named, and received by him for his sole use, and that the said H. E. was only surety for the said A. W., and that the said plaintiff afterwards accepted a composition for what he alleged to be due on said bond from the said A. W. without the privity of the said H. E. in his lifetime, or this defendant since the death of the said H. E., which took place on or about the —— day of ——, as in the said bill mentioned, since which no demand has been made on this defendant for any money alleged to be due on the said bond; and that the said A. W. died several years ago, seized of considerable real estates, and also possessed of a large personal estate; and that his heir-at-law, or the devisee of his real estate, and also the representative of his personal estate, ought to be, but are not, made parties to the said bill. Therefore &c. (*Conclude as above.*)

**IX. THAT THE SITUATION OF THE DEFENDANT RENDERS IT IMPROPER FOR A COURT OF EQUITY TO COMPEL A DISCOVERY.**

*22. Plea that the discovery sought by the bill would betray the confidence reposed in the defendant as an attorney.*

[*Title and commencement as above.*]

As to so much and such part of the said bill as seeks a discovery from this defendant of the title of W. W., Esq., another defendant in the said bill named, to all or any of the messuages, lands, &c., late of C. W., Esq., his late grandfather, deceased, in the said bill also named, this defendant doth plead thereto, and for plea, saith, that he, this defendant, is duly admitted and sworn an attorney of ——, and also a solicitor of this honorable Court, and has for several years past practised, and now practises as such; and this defendant was employed by C. W., Esq., deceased, the late father of the said other defendant W. W., in the lifetime of the said C. W., and since his decease has also been employed in that capacity by the said other defendant J. W., the mother and guardian of the said W. W. during his minority, and by the said W. W. since he attained his age of twenty-one years; and in that capacity only, or by means of such employment only has had the inspection and perusal of any of the title deeds of and belonging to the said estate, or any part or parts thereof, for the use and service of his said clients, and therefore ought not, as this defendant is advised, to be compelled to dis-

cover the same. Wherefore this defendant doth plead the several matters aforesaid, in bar to such discovery as aforesaid is sought by the said bill, and humbly prays the judgment of this honorable Court, whether he is bound to make any further or other answer thereto.

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#### X. PLEAS TO BILLS NOT ORIGINAL.

##### 23. *Plea to a Bill of Revivor.*

[*Title and commencement as above.*]

That the said plaintiff is not, as stated in the said bill of revivor, the personal representative of A. B., deceased, the testator therein named, and as such entitled to revive the said suit in the said bill of revivor mentioned, against this defendant; but the said plaintiff is the administrator only of C. D., late of &c., deceased, who died intestate on the — day of — last, and was the sole executor of the said A. B.; and that letters of administration of the goods and estate of the said A. B., unadministered by the said C. D. in his lifetime, have, since the death of the said C. D., been duly granted by the proper Court to E. F., of &c., who thereby became, and now is, the legal personal representative of the said A. B. Wherefore the said defendant demands the judgment of this honorable Court, whether he shall be compelled to answer the said plaintiff's bill, and humbly prays to be dismissed with his reasonable costs in this behalf sustained.

##### 24. *Plea to a Supplemental Bill.*

[*Title and commencement as above.*]

That the said matters and things in the said plaintiff's present bill, stated and set forth by way of supplement, arose, and were well known to the said plaintiff, before and at the time the said plaintiff filed his original bill in this cause, and that such said several matters and things can now be introduced, and ought so to be, if necessary, by amending said original bill. Wherefore &c.

## CHAPTER IX.

## ANSWER.

## I. FORMS OF COMMENCEMENT AND CONCLUSION OF ANSWERS.

1. *Commencement.**The title of a defence by answer to a suit in Chancery.*

The answer of —, the defendant, [or one of the defendants,] or the joint and several answers of —, the defendants, [or two of the defendants,] to the bill of complaint of —, plaintiffs.

*By an infant.*

The answer of C. D., an infant under the age of twenty-one years, by L. M., his guardian, defendant to the bill of complaint of A. B., plaintiff.

*By a lunatic or idiot, &c.*

The joint answer of E. F., a lunatic, [or idiot or imbecile person,] by T. P., his guardian *ad litem*, and T. P., committee of the said E. F., defendants, to the bill of complaint of A. B., the plaintiff.

*Where the bill misstates the names of defendants.*

The joint and several answer of J. L., in the bill called R. L., and of C. E., in the bill called D. E., defendants, to the bill of complaint of A. B., plaintiff.

2. *Introduction, or words of course, preceding an answer.*

This defendant [or these defendants respectively], now and at all times hereafter saving to himself [or themselves] all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is [or these defendants are] advised it is material or necessary for him [or them] to make answer to, answering saith [or severally answering say].

*By a formal party who is a stranger to the facts.]* This defendant, saving and reserving to himself &c. (as above), answers and says, that he is a stranger to all and singular the matters and things in the said plaintiff's bill of complaint contained, and therefore leaves the plaintiff to make such proof thereof as he shall be able to produce; without this, that &c.

*By an infant.*] This defendant, answering by his said guardian, saith that he is an infant of the age of — years or thereabouts, and he therefore submits his rights and interests in the matters in question in this cause to the protection of this honorable Court; without this, that &c.

### 3. Conclusion of answers.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable Court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

*Where party claims the same benefit of defence as if the bill had been demurred to for want of equity.*] And this defendant submits to this honorable Court, that all and every of the matters in said plaintiff's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said plaintiff is not entitled to any relief from a Court of Equity, and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said plaintiff's bill. And this defendant denies &c.

### 4. Modern form of answer in England.<sup>1</sup>

In Chancery.

A. B., . . . . . Plaintiff,  
and

C. D. [and E. F.], . . . . . Defendants.

*Commencement.*] The answer of C. D., one of the above-named defendants [*or the above-named defendant, as the case may be*], to the bill of complaint [*or the amended bill of complaint*] of the above-named plaintiff.

In answer to the said bill, I, C. D., say as follows:—

1. I admit that the indenture of the 14th day of May, 1854, in the

<sup>1</sup> The answer of a defendant in England must now be in the first person, and divided into paragraphs, numbered consecutively, each paragraph containing as nearly as may be a separate and distinct allegation. 15 & 16 Vict. c. 86, s. 14, and Orders of 7th August, 1852.

plaintiff's bill mentioned, was made and executed between and by the several parties, and was to the purport and effect in the said bill set forth, but I crave leave to refer to the said indenture when the same shall be produced to this honorable Court.

2. I believe that such representations as set forth in the — of the interrogatories to the plaintiff's bill were made by — therein mentioned.

3. I deny that I did on the — day of —, or at any other time, state, &c.

4. [*A statement of circumstances varying from the statement thereof in the plaintiff's bill.*]

5. Save as aforesaid, I deny, &c. [*here the allegations in the plaintiff's bill are denied.*]

or

6. Save as aforesaid, I am unable to set forth as to my knowledge, remembrance, information, or belief, whether &c.

7. I claim &c. [*a statement of the defendant's claim or case.*]

(*Counsel's signature.*)

Sworn &c.

#### 5. *Answer of an infant.*

[*Title of cause.*]

The answer of A. B., one of the above-named defendants, an infant under the age of twenty-one years, by —, his guardian.

In answer to the said bill, I, A. B., by —, my guardian, say as follows: —

I am an infant under the age of twenty-one years, that is to say, of the age of — years, and I submit my rights and interests in the matter in question in this cause to the care and protection of this honorable Court.

(*Counsel's signature.*)

#### 6. *Answer of adults and infants.*

The joint and several answer of A. B. and C. D., and of E. F. and G. H., infants, the above-named defendants [*or four of the above-named defendants*], by —, their guardian.

#### 7. *In case of an insufficient answer.*

The further answer of —, one of the above-named defendants, to the bill of complaint of the above-named plaintiff.

8. *Further answer to original bill, and answer to amended bill.*

The further answer of —, one &c., to the original bill of complaint of the above-named plaintiff, and the answer of the said defendant to the amended bill of complaint of the plaintiff.

9. *Answer to original bill and bill of revivor and supplement.*

The answer of —, one &c., to the original bill of complaint of —, the above-named plaintiff, and —, also to the bill of revivor and supplement of the said plaintiff.

In answer to the said original bill, I, —, say as follows: — &c.

In answer to the said bill of revivor and supplement, I say as follows: — &c.

10. *Answer of lunatic and his committee.*

The joint and several answer of A. B., a lunatic, by C. D., his [guardian and] committee, and the said C. D., two of the above-named defendants, to the bill of complaint of the above-named plaintiff.

11. *Statement in answer by husband disclaiming any interest in legacy bequeathed to his wife.*

I have long been separated from my wife, and I disclaim all right, title, and interest in or to the said legacy or sum of \$ —, so bequeathed to my said wife A. S., for her separate use by the will of the said —, as in the said bill mentioned, and every part thereof.

12. *Statement in answer of a feme covert separated from her husband.*

I have long been separated from my husband, and I humbly submit that I ought to be allowed all the costs, charges, and expenses incurred by me in putting in my answer to the said bill of complaint and in other the proceedings in this suit.<sup>1</sup>

13. *Answer and disclaimer.*

[*Title and commencement as before.*]

I have never received any part of the estate or effects of the testator or in any wise intermeddled therein, and I have never assented to or in any manner accepted the said devise made to me by the said will jointly with the said —, and I have never in any manner consented to become a

<sup>1</sup> An order must be obtained for a married woman to answer separately from her husband. Ante, Vol. I. pp. 142, 143, 483, Vol. II. p. 1876.

trustee of the said will or in any manner acted or interfered in the trust thereof; and, in fact, I have at all times refused to accept, and do now refuse to accept, the office of trustee of the said will; and I have always disclaimed, and do hereby disclaim and renounce the said devise made to me by the said will, and all and singular the estates and property which could or might pass under or by virtue thereof, and all estate and interest therein, and also the trusts of the said will and the office or duty of executing the same.

*14. Where a defendant objects to answer particular interrogatories.*

As to the several interrogatories numbered 18, &c., and as to such of the other interrogatories [or parts of interrogatories] (if any) as I may not have answered, I am advised and humbly submit that I am not bound to answer the same, and I therefore decline to answer the said interrogatories [and parts of interrogatories]; and I claim the same benefit of the objection as if I had demurred to the same or to the discovery sought thereby.<sup>1</sup>

And I also humbly submit that the plaintiffs are not entitled in this suit to the relief sought in and by the 3d &c. paragraphs of the prayer of the supplemental bill, or for the purposes thereof to have any accounts, directions, or inquiries taken, given, or made; and I claim the same benefit of the objection as if I had demurred to the relief so sought.

*15. Statement in answer to prevent plaintiff from calling for the production of documents in defendant's possession.*

I have now in my possession or power the several letters, papers, and writings relating to the matters in the bill mentioned, or some of them; and I have in the schedule hereto, which I pray may be taken as part of this my answer, set forth a list or schedule of all the said letters, papers, and writings; but I deny that thereby or otherwise, if the same were produced,<sup>2</sup> the truth of the matters in the said bill mentioned, or any of them, would appear, further or otherwise, than as the same is hereinbefore admitted.

Such of the said letters, papers, and writings as are set forth in the first part of said schedule are of great importance to the claim made by me in my said action, and are or contain the evidence on which I am advised and intend mainly to rely at the trial of the said action; and the said letters, papers, and writings, as well those in the second and third parts as those

<sup>1</sup> Ante, Vol. I. pp. 733, 734, 735; *Mason v. Wakeman*, 2 Phil. 516; *Swinborne v. Nelson*, 16 Beav. 416; *Bates v. Christ's College, Cambridge*, 5 W. Rep. 337.

<sup>2</sup> See *Peile v. Stoddart*, 1 M. & G. 192. In *Manly v. Bewicke*, 2 Jur. N. S. 671.

in the first part of the said schedule, or any of them, do not nor does, as I am advised and verily believe, contain any evidence whatever in support of or tending to support the plaintiff's pleas in the said action, or any of such pleas, and are not, nor is, in any manner, material to the plaintiff's case.

*As to confidential communications.*] Such of the said letters, papers, and writings as are set forth in the second part of the said schedule were and are private<sup>1</sup> and confidential communications between me and my solicitors or legal advisers in the ordinary course of professional business, and all and every of them relate to the matters in dispute between me and the plaintiff in the said action; and the plaintiff has not, as I am advised and verily believe, any right or title to the production of, or any interest whatever in, the letters, papers, and writings in the said schedule mentioned, or any of them.

16. *Statement in an answer by mortgagees raising the defence of the Statute of Limitations.*

The said G. S., deceased, did not, as we severally verily believe, at any time during the period he was so in possession or receipt of the rents and profits of the said mortgaged hereditaments as aforesaid, sign or give any acknowledgment in writing or otherwise, of the title of the said J. M. and T. M., or either of them, or of any person or persons claiming under them or either of them, to the said J. M. and T. M., or either of them, or to the plaintiffs in this suit or either of them, or to the defendant W. T., or to any person or persons whatsoever claiming any estate or interest in the said hereditaments, or to the agent or agents of the said J. M. and T. M., or of the plaintiffs or of the defendant W. T., or either of them; nor have or hath one or either of us, at any time or times subsequently to the decease of the said G. S., signed or given any acknowledgment &c. (*as above*).

The said J. M. and T. M. have not nor hath either of them, nor have or hath the plaintiffs or the defendant W. T., or any or either of them, made any payment whatever, either in respect of interest of the said several mortgage securities or any or either of them, or of the principal moneys thereby secured, or any part thereof, subsequently to the time when the said G. S., deceased, so entered into the possession or receipt of the rents and profits of the mortgaged hereditaments and premises as aforesaid.

We severally claim the benefit of the provision made in and by the statute passed in the session holden in the third and fourth years of the reign of his late Majesty, William the Fourth, "For the Limitation of Actions, and suits relating to Real Property, and for simplifying the Remedies

<sup>1</sup> See ante, Vol. I. pp. 598, 599.

for trying the Rights thereto," in bar to the relief sought by the plaintiffs in this suit, in the like manner as if we had pleaded the same.<sup>1</sup>

17. *Another form of answer of the Statute of Limitations.*

And the defendants, in addition to the foregoing answer, aver that the cause of action, if any there may be, arising to the plaintiffs on account or by reason of the several allegations and complaints in their said bill contained, did not accrue within six years before the said bill was filed, and this allegation the defendants make in bar of the plaintiffs' bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

18. *Statement in answer of a trustee of acquiescence on the part of the cestui que trust to the application of the trust fund.*

I consented to sell the said — Bank Annuities, and did sell the same, and paid and applied the produce thereof, at the special instance and request of the plaintiff [as well as of the defendant], in &c.

[Set forth the correspondence, documents, or admissions tending to establish this allegation.<sup>2</sup>]

I claim to have the interest in the said — applied in or towards satisfying any sum of money which I may be called upon or be bound to pay in respect of the said sale and application of the said trust fund.

19. *An answer insisting on the benefit of the Statute of Frauds, as if it had been pleaded by the defendant.*

[Title and commencement as above.]

That by a certain statute — made and passed in the — for the prevention of frauds and perjuries, and commonly called the statute of frauds, all contracts and agreements relating to lands, except as therein is excepted, are required to be reduced into writing, and signed by the party or parties

<sup>1</sup> See *Jortin v. Southeastern Railway Co.* 6 De G., M. & G. 270; 1 Jur. N. S. 433; *Staley v. Barrett*, 5 W. Rep. 188. The defendant who relies upon the Statute of Limitations as a defence to a bill must raise that defence by plea or answer, although the plaintiff does not require an answer. *Holding v. Barton*, 1 Sm. & G., App. xxv.

<sup>2</sup> If the *cestui que trust* joins with the trustee in that, which is a breach of trust, knowing the circumstances, such *cestui que trust* can never complain of such breach of trust. Per Lord Eldon, in *Walker v. Symonds*, 3 Swanst. 64. And the interest of a *cestui que trust*, who concurs with a trustee in a breach of trust, is liable to indemnify the trustee. *Booth v. Booth*, 1 Beav. 125; *Farrar v. Barraclough*, 2 Sm. & G. 231; *Lockhart v. Reilley*, 25 L. J. Ch. 697; *Baynard v. Woolley*, 20 Beav. 583.

to be bound thereby; and that the said agreement in the said bill mentioned, and therein alleged to have been made and entered into by this defendant and the said plaintiff, was not reduced into writing and executed pursuant to the said statute, and therefore this defendant insists that the same is void as against this defendant; and that he cannot be affected thereby, and this defendant claims the same benefit as if he had pleaded the same statute in this cause; and this defendant, for the reasons, and under the circumstances aforesaid, is advised, and insists, that the said plaintiff is not entitled to any relief against this defendant touching the matters complained of in the said bill. (*Conclude as above.*)

20. *Another form of answer claiming the benefit of the Statute of Frauds.*

I say that no agreement in writing for purchase of the said premises or any part thereof, nor any memorandum, or note thereof in writing, has been made, entered into or signed by me or by any person thereunto by me lawfully authorized, and I claim the benefit of the statute passed in the twenty-ninth year of Charles the Second for the prevention of frauds and perjuries, in the same manner as if I had pleaded or demurred to the plaintiff's bill.<sup>1</sup>

21. *Another more extended Form.*

And this defendant sets forth, in answer to the several averments of contracts, agreements, promises, and trusts concerning the premises, with, to, or for the benefit of said plaintiff, in the said bill contained, and to so much of the said bill as sets forth any pretended contract, agreement, trust, or confidence between the said plaintiff and defendant, or as seeks any relief or discovery of this defendant of or concerning any pretended contract, agreement, trust, or confidence between this defendant and the plaintiff touching the said lands mentioned in said bill or any part thereof, — the Statute of Frauds, as enacted in the laws of the State [*or Commonwealth*] of — by the — section of the — chapter, and the — section of the — chapter, of the — statutes.

And this defendant says, that neither he, nor any person by him lawfully authorized thereto, did ever make or sign any note or memorandum in writing [*or (if so) any writing whatsoever*], of or containing any such contract, promise, or agreement, or grant, or declaration [*or (if so) any contract, promise, or agreement, or grant, or declaration whatsoever*] with, to, or for the benefit of the said plaintiff, touching the said lands, or creating

<sup>1</sup> If a defendant does not insist by his answer upon the benefit of the Statute of Frauds, he cannot avail himself of its provisions at the hearing, although he denies the agreement set up by the bill. *Clifford v. Turrell*, 1 Y. & Coll. C. C. 138. See, also, *Baskett v. Cafe*, 4 De G. & S. 388.

any estate or interest therein, or creating or declaring any trust respecting the same, in or for the benefit of the said plaintiff; and this defendant insists upon the said statutes and claims the same benefit therefrom as if he had pleaded the same.

22. *Form of answer prescribed by Chancery Rules in New Hampshire.*

*Answer.*

In the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. & a.

The answer of T. A.

The said T. A. says said T. D., on the — day of —, 18—, was greatly in debt, beyond his means to pay, and for the purpose of delaying and defrauding his creditors, without any valuable consideration paid by said T. P. or received by said T. D., he did then make and deliver to said P. D. his promissory note of that date for the sum of \$ 1000, and interest, payable in one year, with interest, in said bill mentioned, and executed and delivered to said T. P. the said mortgage in said bill set forth.

On the — day of —, 18—, the said T. D. being then and long before justly indebted to this defendant in the sum of \$ 800, upon and by virtue of certain promissory notes theretofore, for a valuable and *bona fide* consideration, made and executed to him, this defendant became urgent for the payment of the same; and said T. D. then proposed to make and execute to this defendant a deed of conveyance of said premises in said bill described; and this defendant, having no notice of the said pretended mortgage, or reason to believe or suspect the existence of the same, but being on friendly terms with the said T. P., did consult and advise with him relative to the purchasing of said T. D. the premises aforesaid, for said sum of eight hundred dollars, which he now alleges to be greatly above the value thereof, and the said T. P. did then and there strongly recommend and advise this defendant to make the said purchase, and this defendant thereupon agreed to buy and did purchase said premises for eight hundred dollars, and took from T. D. a good and valid conveyance, as he is advised and believes, of said premises, and actually and in good faith paid the sum of eight hundred dollars, by giving up and surrendering to said T. D. his said notes without notice of the said title now by said T. P. in said bill set up.

T. H., by

Q. H., his Solicitor.

## CHAPTER X.

## REPLICATION.

*Form of General Replication.**The replication of A. B., plaintiff, to the answer of C. D., defendant.*

This repliant, saving and reserving to himself all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove, as this honorable Court shall direct; and humbly prays, as in and by his said bill he hath already prayed.<sup>1</sup>

*Form of replication prescribed in Chancery Rules of New Hampshire.*

In the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. &amp; a.

The said plaintiff says his bill is true, and the defendant's answer, as set forth, is not true, and this he is ready to prove.

T. P., by  
A. S., his Solicitor.

<sup>1</sup> By Rule 14 of Chancery Practice in Massachusetts, as a substitute for the general replication now in use, the plaintiff shall enter in the cause; "that he joins issue on the answer"; and by the same rule it is provided that no special replication to an answer shall be filed, but by leave of Court, or one of the justices thereof, for cause shown.

## CHAPTER XI.

## EXCEPTIONS TO ANSWERS.

*For insufficiency. (English form.)*

In Chancery.

Between E. D., . . . Plaintiff,  
and  
J. P., . . . Defendant.

Exceptions taken by the above-named plaintiff to the answer of the defendant [*or if more than one defendant, of the defendant —*] for insufficiency.

*First exception.*] For that the said defendant has not in and by his said answer, according to the best of his knowledge, remembrance, information, and belief, answered and set forth whether, &c.

*Second exception.*] For that the defendant has not in and by his said answer in manner aforesaid answered and set forth whether, &c.

[*And so with respect to the other exceptions, using the words of the interrogatory not answered.*<sup>1</sup>]

In all or some of which particulars the said plaintiff is advised that the said answer of the defendant is evasive and insufficient, and ought to be amended, and humbly prays the same may be amended accordingly.

(*Counsel's name.*)

<sup>1</sup> Each exception should be confined to a distinct question, although the interrogatory, as numbered, may contain several questions; at least it ought to be so confined, if there is any ground for the defendant to contend that he has answered a part of the interrogatory. *Higginson v. Blackley*, 1 Jur. N. S. 1104; 25 L. J. Ch. 74, V. C. K. The exception should adopt the language of the interrogatory. *Woodroffe v. Daniel*, 10 Sm. 243; *Brown v. Keating*, 2 Beav. 581; *Esdaile v. Molyneaux*, 1 De G. & Sm. 218, 111.

## CHAPTER XII.

## NOTICE OF MOTIONS.

1. *For an injunction to stay proceedings at law.*

In Chancery.

[*Title of cause.*]

Take notice that this honorable Court will be moved, for and on behalf of the plaintiff, on the — day of —, instant [*or next*], that the defendant — may be restrained from commencing or prosecuting any action or other proceedings at law against the plaintiff, for the recovery of the sum of \$ — in the plaintiff's bill mentioned, or for —, or in respect of the matters mentioned in the plaintiff's bill, or any of them, until the further order of this Court.<sup>1</sup> Dated this — day of —, 1857.

A. B.,

*Plaintiff's Solicitor.*

To Mr. — and Mr. —,  
*Solicitors for the Defendants.*

2. *For an injunction to stay an action brought against an executor after decree.*[*Title &c.*]

Take notice that this honorable Court will be moved &c.

That —, of —, may be restrained from further proceeding in or prosecuting the action at law commenced by him in — Court of &c., against the defendant — as executor of —, the testator in the pleadings of this cause named, for the recovery of a sum of money alleged to be due to him from the estate of the said testator, and from commencing or prosecuting any other action or actions at law against the said defendant — as an executor as aforesaid. Dated &c.

<sup>1</sup> In order to obtain an injunction for stay of proceedings at law, an application must be made to the Court upon affidavit, verifying the facts alleged in the bill, and if the defendant has appeared, upon notice; if not, the application may be made *ex parte*, or leave may be asked for the Court to give notice of motion for a certain day; and if necessary permission should also be required to serve the notice and copy of the bill upon the attorney for the plaintiff at law. *Ferguson v. Beavan*, 16 Jur. 1111. If the defendant has appeared, interrogatories for his examination should be filed, and a copy delivered to his solicitor. *Lovell v. Galloway*, 20 L. T. 231, M. R. See *Wightman v. Wheilton*, 5 W. R. 337, M. R.

3. *For special injunction against commission of waste or other act complained of in bill.*

[ *Title &c.* ]

Take notice &c., &c., that the defendant <sup>1</sup> ——— and his agents <sup>2</sup> [*workmen and servants*], may be restrained from [*here follows the prayer in the bill*] until the hearing of this cause, or the further order of the Court. Dated &c.

4. *For the appointment of a receiver.*

[ *Title &c.* ]

Take notice &c., &c., that some proper person may be appointed a receiver of the rents and profits of the estates in the pleadings in this cause mentioned, with the usual directions.<sup>3</sup> Dated &c.

5. *Notice to next of kin of application for a representative ad litem of a deceased person.*

Whiteaves v. Melville (V. C. W.).

SIR,

We beg to inform you that on ——— an application will be made in this cause to ———, by ———, to appoint some person to represent the estate of the late ———, deceased, and that unless you, the father and sole next of kin of the deceased, shall then appear and consent to be appointed so to represent the estate of the said intestate, some other person will be appointed.<sup>4</sup>

We remain, &c.,

A. B.,

*Solicitors for the Plaintiff.*

6. *Of filing answer.*

[ *Title of cause &c.* ]

Take notice, that I have filed the answer of the defendant in this cause.<sup>5</sup> Dated &c.

Yours, &c.,

A. B.,

*Defendant's Solicitor.*

<sup>1</sup> Ante, Vol. II. p. 1714.

<sup>2</sup> See Lord Wellesley v. Earl of Mornington, 11 Beav. 180, 181.

<sup>3</sup> A receiver will be appointed to collect personal estate in a foreign country, and to get in rents, and also to sell the real estates there, and receive the produce thereof when sold. *Hinton v. Galli*, 24 L. J. Ch. 121, B. And a receiver was also appointed after a decree for sale. *In re Bywater's Estate*, 1 Jur. N. S. 227, V. C. W.

<sup>4</sup> See *Tarratt v. Lloyd*, 2 Jur. N. S. 371 ; *Tripp's Forms*, 60.

<sup>5</sup> In England, notice must be given in like manner of the entering of any appearance or filing any plea, demurrer, or replication.

7. *To take evasive answer off the file.*

[*Title &c.*]

Take notice &c., &c., that the answer of the defendant — in this cause, filed &c., may be taken off the file,<sup>1</sup> with costs to be paid by the said defendant. Dated &c.

8. *To discharge an order for irregularity.*

[*Title &c.*]

Take notice &c., &c., that the order made in this cause, bearing date &c., whereby &c., may be discharged for *irregularity*, with costs to be taxed by one of the taxing masters of this Court [*or by the clerk, or registrar*]. Dated &c.

A. B.,  
*Defendant's Solicitor.*

9. *For leave to examine witnesses de bene esse.*

[*Title &c.*]

That the plaintiff may be at liberty to examine — and — as witnesses for him in this cause *de bene esse*,<sup>2</sup> and that some proper person may be appointed as a special examiner for the purpose of taking such examination. Dated &c.

10. *Of appointment before examiner to take cross-examination of deponents in affidavits.*

[*Title &c.*]

That the examiner, —, Esq., has appointed the — day of —, at the hour of — o'clock, at his office in —, on behalf of the plaintiff [*or defendant*], as the case may be, to cross-examine — and —, being the deponents in certain affidavits filed on the part of the said — in this cause; and further take notice, that you are required at the like time and place to produce before the examiner certain letters, dated &c., and all.

<sup>1</sup> See *Lynch v. Lecesne*, 1 Hare, 631; *Brooks v. Purton*, 1 Y. & Coll. C. C. 278; *Reid v. Barton*, 3 Jur. N. S. 263, V. C. W.

<sup>2</sup> Ante, Vol. I. p. 954; *Mackenna v. Everitt*, 2 Beav. 189, 191; *Hope v. Hope*, 3 Beav. 317.

other letters and copies of letters, books, memoranda, papers, and writings in your or either of your possession or power relating to [*the special matter or question in dispute*], and other the matters in question in this cause.<sup>1</sup>  
Dated &c.

A. B.,  
*Plaintiff's Solicitor.*

To &c.

11. *That plaintiff's bill may stand dismissed for want of prosecution.*

[*Title &c.*]

Take notice &c., &c., that the bill filed in this cause may stand dismissed out of Court, with costs to be taxed &c., for want of prosecution. Dated &c.<sup>2</sup>

To Mr. &c.,  
*Plaintiff's Solicitor.*

12. *Notice of motion for decree.*

[*Title &c.*]

Take notice, that this Court will be moved before &c., at the expiration of — after the date hereof, or as soon after as counsel can be heard by &c., of counsel for the plaintiff, that a decree may be made in this cause in accordance with the prayer of the plaintiff's bill.<sup>3</sup> Dated &c.

Yours &c.,  
A. B.,  
*Plaintiff's Solicitor.*

To —, the Solicitor for the  
above-named defendant.

The following affidavits will be used in support of such motion: —

The affidavit of &c.

The affidavit of &c.

13. *To settle minutes of decree.*

[*Title &c.*]

I shall attend at — o'clock in the — on —, the — instant, at

<sup>1</sup> Ante, Vol. I. p. 896; Tripp's Forms, 62. Under the new practice in England, the evidence of all the witnesses is common to all parties to the suit, therefore one defendant may cross-examine the witnesses of another defendant. *Lord v. Colvin*, 3 Drew. 22; 1 Jur. N. S. 298.

<sup>2</sup> Ante, Vol. I. p. 795; Tripp's Forms, 62.

<sup>3</sup> Ante, Vol. I. p. 822; Tripp's Forms, 63.

the Registrar's [*or* clerk's] office, to settle the minutes of the decree [*or* order] in this cause. Dated &c.

Yours &c.,

A. B.,

*Plaintiff's Solicitor.*

To Mr. —, ,

*Defendant's Solicitor.*

14. *Notice to pass decree.*

[*Title &c.*]

I shall attend at — o'clock in the — on —, the — instant, at the —'s office, to settle the minutes of [*or* pass] the decree [*or* order] in this cause. Dated &c.

15. *To vacate enrolment of decree.*

[*Title &c.*]

Take notice &c., &c., that the enrolment of the decree [*or* order] dated the — day of —, made by his honor, —, may be vacated. Dated &c.

16. *To suppress depositions.*

[*Title &c.*]

Take notice &c., &c., that the deposition of A. B., a witness examined in this cause on the part of the defendant before — examiner, on the — day of — last, be suppressed. Dated &c.

17. *For an issue at law.*

[*Title &c.*]

Take notice &c., &c., that issues at law may be awarded in this cause for the trial, by jury, of the matters in controversy therein. Dated &c.

18. *To dissolve injunction.*

[*Title &c.*]

Take notice &c., &c., that the injunction issued in this cause may be dissolved, with costs. Dated &c.

19. *For order to stay proceedings in original suit.*

A. B. }  
   v.    } Original bill.  
 C. D. }  
 C. D. }  
   v.    } Cross-bill.  
 A. B. }

Take notice &c., &c., that the proceedings in the original suit commenced by the above A. B. be stayed, until the said A. B. shall have put in his answer to the cross-bill, filed against him by C. D. Dated &c.

Yours &c.

To &c.

20. *For an attachment for contempt.*

[Title &c.]

Take notice &c., &c., that an attachment as for a contempt be issued against the above defendant, for violating the injunction issued in this cause. Dated &c.

21. *For hearing.*

[Title &c.]

Take notice that this cause will be brought to a hearing on bill and answer [or on pleadings and proofs; or on the demurrer filed therein, or on bill, answer, and replication] before —, on the — day of —, at — o'clock, or as soon after as counsel can be heard. Dated &c.

22. *Notice of hearing on bill and answer.*

(New Hampshire.)

IN THE SUPREME JUDICIAL COURT.

H—, ss.

T. P. v. T. D. & a.

The defendants will take notice that the said cause will be heard on bill and answer at the next law term.

T. P., by  
A. S., his Solicitor.

If the bill is set down by *defendant* for a hearing on bill and answer, the notice on his part should have, underwritten, an affidavit of defendant's solicitor, as follows:—

IN THE SUPREME JUDICIAL COURT.

H—, ss.

T. P. v. T. D.

I, A. D., solicitor of said defendant, testify and say that the defendant's answer [plea or demurrer] was delivered to the plaintiff's solicitor on the — day of —, 18—, and that — has since elapsed, and no amendment, replication, or exceptions have been delivered to me, or left at my dwelling-house or place of business, by the said plaintiff or his solicitor, or have otherwise come to my hands or knowledge.

A. D.

H— ss., —, —, 18—. Personally appeared A. D., and made oath that the above affidavit, by him subscribed, is true.

Before me,

A. B., *Justice of the Peace.*

CHAPTER XIII.

PETITIONS AND MOTIONS.

1. *Petition to take the answer of a defendant without oath. [English forms.]*

In Chancery.

Between A. B.,	.	.	.	.	Plaintiff,
and					
C. D. [and others],	.	.	.	.	Defendants.

To the Right Honorable the Master of the Rolls.

The humble petition of the plaintiff —

Showeth,

That your petitioner having filed his bill in this Court against the above-named defendant and others, he is willing to take the answer of the defendant C. D. without oath.

Your petitioner therefore humbly prays, that the said defendant C. D.

may be at liberty to put in his answer to your petitioner's said bill without oath [*or signature*].

And your petitioner shall ever pray &c.

2. *To amend bill.*

[*Title &c.*]

Showeth,

That your petitioner, having filed his bill in this honorable Court, the defendants have not appeared thereto [*or have appeared thereto, and have not yet answered*]; and your petitioner is advised to amend his said bill.

Your petitioner therefore humbly prays, that he may be at liberty to amend his said bill, as he shall be advised, without costs, amending the defendants' &c. copies.

And &c.

*Another form of petition for amendment of bill.*  
(New Hampshire.)

IN THE SUPREME JUDICIAL COURT.

H—, ss.

T. P. v. T. D. & a.

Amendment of bill.

After the words "—," insert "—."

To Mr. Justice B.

T. P. prays that the foregoing amendment to his bill may be allowed.  
T. P.

To T. D., T. M. & T. A.

Take notice, that on the — day of — next, the above petition will be presented to Mr. Justice B., at his office in Concord, at eleven o'clock in the forenoon.

T. P., by  
A. S., his Solicitor.

—, —, 18 —.

3. *To amend bill after answer, but not requiring further answer.*

[*Title &c.*]

Showeth,

That your petitioner [*or petitioners*] having exhibited his [*or their*] bill in this honorable Court against the said defendant R. A. and others, who have all appeared thereto and put in their answers; and that your petition-

er [*or* petitioners] is [*or* are] advised to amend his [*or* their] said bill, but he [*or* they] does [*or* do] not require any further answer from the defendants.

Your petitioner [*or* petitioners] therefore humbly prays [*or* pray], that he [*or* they] may be at liberty to amend his [*or* their] said bill, as he [*or* they] shall be advised, amending the defendants' copies, and requiring no further answer from the said defendants.

4. *To amend bill after answer, requiring further answer.*

[*Title &c.*]

Showeth,

That your petitioners having exhibited their bill against the above-named defendant W. F. and others, the said defendant W. F. only hath appeared and put in his answer thereto (none of the other defendants having yet appeared to the said bill), since which your petitioners are advised to amend their said bill.

Your petitioners therefore humbly pray, that they may be at liberty to amend their said bill, as they shall be advised, on payment of \$—— costs to the said defendant W. F. in respect thereof, and without costs as to the other defendants.

And &c.

5. *To amend a bill by adding a defendant.*

[*Title &c.*]

Showeth,

That your petitioner filed his bill in this honorable Court, against the defendant, on the —— day of ——, to which the defendant has appeared and put in his answer, upon which your petitioner is advised to make E. F. a party in this cause, and to bring him before the Court as a defendant to the suit.

Your petitioner therefore prays that he may have leave to amend his bill by adding the said E. F., a defendant thereto, with apt words to charge him.

And &c.

6. *Of plaintiff to be admitted to sue in forma pauperis.*

[*Title &c.*]

Showeth,

That your petitioner having filed his bill in this honorable Court against the said defendant, thereby setting forth, that [*here state concisely the purport of the bill*].

That your petitioner is not worth £5 in all the world, his wearing ap-

parel and the matters in question in this cause only excepted, and he is utterly unable to prosecute his said suit, unless he is admitted to do so *in forma pauperis*.

Your petitioner therefore humbly prays, that he may be admitted to prosecute his said suit *in forma pauperis*, and that Mr. — may be assigned his counsel, and Mr. — his Solicitor.

And &c.

[ *Counsel's certificate to be written at the foot of the petition.* ]

I humbly conceive that the plaintiff has just cause to be relieved touching the matters of this petition, and for which he has exhibited his bill.

[ *Date.* ]

[ *Counsel's name.* ]

7. *Of a defendant to be admitted to defend in forma pauperis.*

[ *Title &c.* ]

Showeth,

That your petitioner has been served with a copy of the bill in this cause; that your petitioner is not worth £5 in all the world, his wearing apparel and the subject-matter of this suit only excepted, and by reason of his poverty is unable to make his defence thereto, if not permitted to defend *in forma pauperis*.

Your petitioner therefore humbly prays, that he may be permitted to defend this suit *in forma pauperis*, and that counsel and solicitor may be assigned to him for that purpose.

And &c.

8. *To assign a guardian ad litem to an infant defendant.*

[ *Title &c.* ]

Showeth,

That the plaintiff has filed his bill against your petitioner, who has appeared thereto [and is preparing to answer the same]; that your petitioner is an infant under the age of twenty-one years.

That your petitioner is advised that — of —, who is your petitioner's [*state relationship*], is a proper person to be appointed his guardian to defend this suit.

Your petitioner therefore humbly prays, that the said — may be assigned his guardian, by whom he may [answer the plaintiff's bill and] defend this suit.

And &c.

9. *For the appointment of a guardian ad litem on petition of the plaintiff.*[ *Title &c.* ]

Showeth,

That the bill in this suit was filed against the defendant to foreclose a mortgage executed by the father of said defendant, who is now deceased, in his lifetime, to your petitioner, and praying for a sale of the mortgaged premises; and that the said defendant claims an interest in the said premises as heir at law of her father; and the said defendant C. D. resides in the town of —, and is, as the petitioner is informed and believes, an infant under the age of twenty-one years, viz. of the age of fifteen years and upwards. And that on the — day of — process in this cause was duly served on the said C. D. requiring her to appear and answer the said bill, returnable on the — day of —. And your petitioner further shows, that, although more than — days have elapsed since the day of appearance named in said process, no guardian *ad litem* has as yet been appointed for such infant, or applied for by her or by any person on her behalf, to the knowledge or belief of your petitioner.

Your petitioner, therefore, prays that A. H. the Clerk of this Court, may be appointed guardian *ad litem* of such infant defendant, to appear and defend this suit in her behalf.

And &amp;c.

10. *To be admitted to prosecute or defend, by an administrator.*

(New Hampshire.)

To the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. &amp; a.

J. H., of &c., says that T. P., the said plaintiff, died intestate, on the — day of —, 1860, and the said J. H. was, at a Court of Probate for said county, held at —, on the — day of —, 186—, duly appointed administrator of the estate of said deceased; wherefore he prays that he may be admitted to prosecute this bill.

J. H.

And thereupon it is ordered that the said J. H. be admitted to prosecute said bill.

N. B., *Clerk.*

11. *For notice to administrator to appear and defend.*

(New Hampshire.)

To the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. &amp; a.

T. P. says that T. D., one of the defendants in this cause, died on or about the — day of —, 186—, and one X. Y. has been since duly appointed administrator of his estate; wherefore he prays that said X. Y. may be duly notified to appear and defend the said suit.

T. P., by

A. S., *his Solicitor.*12. *For leave to make new parties upon the decease of one of the original parties.*

Supreme Judicial Court.

C. G. L., Executor v. I. T. &amp; als.

The plaintiff suggests that Nathaniel I. Bowditch, trustee under the will of Andrew Thorndike, one of the defendants to the suit, has deceased, and that William I. Bowditch and John Goldsborough have been appointed trustees in his place; and therefore asks leave to amend his bill and make them parties.

F. C. L., *Solicitor.*13. *By husband and wife.*

(New Hampshire.)

[*Title &c.*]

G. P., of &c. and said T. P., say that on the — day of —, 186—, said T. P. was lawfully married to G. P.; wherefore the said G. P. and T. P. pray that they may be admitted jointly to prosecute said bill.

G. P.,

T. P., by

A. S., *their Solicitor.*

14. *For discharge of defendant out of custody of sheriff or messenger.*

(English.)

[*Title &c.*]

Showeth,

That your petitioner has been taken into custody by the Sheriff of —— [*or the messenger attending this Court*], for not putting in his answer to the plaintiff's bill.

That your petitioner has this day put in his answer to the plaintiff's bill, as by the record and writ Clerk's certificate hereunto annexed appears.

Your petitioner therefore humbly prays, that he may be discharged from the custody of the said Sheriff of —— [*or from custody*] as touching his said contempt, upon paying or tendering the costs thereof.

15. *To withdraw a plea or demurrer.*

[*Title &c.*]

Showeth,

That the plaintiff having exhibited his bill in this honorable Court against your petitioner, your petitioner put in his plea [*or demurrer*] thereto, since which your petitioner is advised to make other defence to the said bill.

Your petitioner therefore humbly prays, that he may be at liberty to withdraw his plea [*or demurrer*] upon payment of costs.

And &c.

16. *That a feme covert may answer separate from her husband.*

[*Title &c.*]

The humble petition of ——, wife of the defendant ——.

Showeth,

That the plaintiff has exhibited his bill in this honorable Court against your petitioner and her said husband [*and others*], to which your petitioner has appeared.

That your petitioner's said husband is residing at ——, out of the jurisdiction of this Court [*or that your petitioner and husband are living separate and apart from each other, or that the said bill is filed in respect of your petitioner's separate estate and interest in the estates (or funds) in question in this cause*].

Your petitioner therefore humbly prays, that your petitioner may be at

liberty to put in her answer to the plaintiff's said bill separate from her husband.

And &c.

17. *Of a plaintiff for a habeas corpus to bring defendant in custody of sheriff to bar of the Court to answer his contempt for not appearing to or answering plaintiff's bill.*

[*Title &c.*]

Showeth,

That the plaintiff filed his bill against the defendant —, to which he has not appeared or answered.

That an attachment has issued against him at the instance of your petitioner, upon which he has been arrested and now remains in the custody of the sheriff of — [charged with other detainers].

Your petitioner therefore humbly prays, that a writ of *habeas corpus cum causis* may issue out of this honorable Court, directed to the said sheriff of the county of —, thereby commanding him to bring the body of the said — into this honorable Court, on &c., in order that the said — may answer his said contempt, and be otherwise dealt with according to law.

And &c.

18. *To use depositions in a cross-cause.*

[*Title &c.*]

Showeth,

That the secondly above-mentioned cause is a cross-cause touching the same matters as the first-mentioned cause, and that your petitioner is advised that the [affidavits and] depositions taken in each cause [or taken in the original cause] will be proper to be read in the other [or the cross-cause].

Your petitioner therefore humbly prays, that the affidavits and depositions taken in either of these causes [or in the original cause] may be read and made use of in the other [or the cross-cause] at the hearing of these causes, saving all just exceptions.

19. *To charge a Solicitor.*

[*Title &c.*]

Showeth,

That your petitioner employed — of —, as your petitioner's solicitor in this suit, and your petitioner is now desirous to appoint — of — as his solicitor.

Your petitioner therefore humbly prays, that he may be at liberty to change his solicitor accordingly.

20. *To prove exhibits by affidavit at the hearing of a cause.*

[*Title &c.*]

Showeth,

That this cause being set down to be heard before —, your petitioner is advised that it will be necessary for him to prove, at the hearing thereof, certain letters written by the defendant to — of the following dates &c., that is to say [*state the dates*].

Your petitioner therefore humbly prays, that he may be at liberty at the hearing of this cause to read an affidavit of, or examine one or more witness or witnesses, *viva voce*, to prove the said defendant's handwriting to the said letters.

21. *For a plaintiff to dismiss his bill with costs.*

[*Title &c.*]

Showeth,

That your petitioner having exhibited his bill in this honorable Court against the above-named defendant, who has appeared [and put in his answer] thereto, your petitioner is now advised to dismiss his said bill.

Your petitioner therefore humbly prays, that the said bill may stand dismissed out of this Court, with costs to be taxed by the proper taxing-master [*or by the clerk of this Court*].

22. *To enter a decree nunc pro tunc.*

[*Title &c.*]

Showeth,

That the decree [*or order*] made in this cause, bearing date &c., has been drawn up and passed by the registrar, but the time for entering the same, according to the rules of this Court, being elapsed,

Your petitioner humbly prays, that the said decree [*or order*] may be entered *nunc pro tunc*.

And &c.

23. *To discharge distringas on stock.*

A. B., . . . . . Plaintiff,  
 and  
 The Governor and Company of the Bank  
 of England, . . . . . Defendants.

To &c.

The humble petition of &c.

Showeth,

That on &c., a writ of *distringas* was issued at the instance of your petitioner against the defendants to prevent the sale or transfer of £ ——— [*describe the stock*] standing in the books of the above-named defendants in the name of ——— &c.

That the purpose for which said writ of *distringas* was issued having been satisfied, your petitioner is desirous of having the same discharged.

Your petitioner therefore humbly prays, that the said writ of *distringas* may be discharged accordingly.

24. *For a Solicitor to deliver his bill of costs, and that it may be taxed.*

[*Title of cause if there has been any suit, if not, the title should be.*]

“In the matter of ———, one of the solicitors of this Court.”

Showeth,

That your petitioner employed ———, one of the solicitors of this Court, to prosecute this suit [and divers suits at law], and in other matters, as your petitioner's solicitor and attorney [*or if no suit, say, in various matters of business for him*] between the month of ———, 186—, and the month of ———, 186—.

That your petitioner is desirous of obtaining the papers of the said ——— belonging to your petitioner, but the said ——— refuses to deliver up the same until his bill of costs is paid.

That the said ———, although applied to for that purpose, has not delivered his bill of costs against your petitioner.

Your petitioner therefore humbly prays, that upon your petitioner submitting to pay the said ——— what shall appear to be due to him upon taxation of the said bill, that the said ——— may be ordered, within ——— after notice hereof, to deliver to your petitioner his bill of all such fees and disbursements as he claims to be due to him from your petitioner; and that it may be referred to the taxing-master [*or clerk*] of this Court, to tax and settle

such bill; and that your petitioner and the said — may produce before the said master, upon oath, as the said master shall direct, all books, papers, and writings in their custody or power respectively relating to such bill, or any of the items or charges therein; and that your petitioner and the said — may be examined upon interrogatories or otherwise touching the same or any of them, as the said master shall direct; and that all other proper and usual directions may be given. And &c.

25. *For leave to withdraw replication and amend bill.*

[*Title &c.*]

Showeth,

That the defendant in this cause has appeared and put in his answer to the bill; and that your petitioner has filed a replication, [*or taken issue on the answer*], but no witnesses have been examined by either party. That since the filing of the replication, your petitioner has been advised, and believes that it is essential to his rights in this cause that his bill should be amended, by adding thereto [*or inserting therein*] the following statements [*insert new matter proposed*].

And your petitioner further shows, that he had no knowledge of the facts above set forth, nor was he aware of the necessity of introducing them into his bill, until after the said replication was filed [*or issue was taken on the answer*].

Your petitioner therefore prays that he may be at liberty to withdraw his said replication, and amend his bill as proposed above, or otherwise, as he shall be advised, on payment of costs. And &c.

26. *Petition to a Justice for a temporary injunction.*

(N. Hampshire.)

(To be written on the original bill or a copy.)

In the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. & a.

To Mr. Justice S.

T. P. prays that the injunction sought in the annexed bill may be granted by said justice, the said bill having been duly filed, and the said Court not being in session.

P. P., by  
A. S., *his Solicitor.*

27. *Petition for an injunction.*

(New Hampshire.)

M——, ss. To the Hon. A. F., one of the Justices of the Supreme Judicial Court.

N. E. C., of &c., complains against G. C., of &c., and says she has caused to be filed in the office of the clerk of said Court for said county, her libel for divorce against the said C. G., in which she alleges, among other things, that she was married to said C. G., on &c., at &c.; that she has resided, and had her home at &c. [*stating the substance of the charges in the libel*]; that she has had by said G. C. two children, now living, to wit, G. C., aged —— years, and L. C., aged —— years; that in said libel the petitioner prays for a divorce and the custody of said children, and for a suitable allowance out of the estate of said G. C., for her support and maintenance, and for the support and maintenance of her said children; that the said G. C. is the owner of a house and —— acres of land in —— &c., in which house he now resides, of the value of —— &c., and of personal estate, in &c., of the value of &c.; and he has threatened that if the petitioner should attempt to obtain a divorce from him, he would spend all his property, so that she would get none of it for herself or her children; and she believes that, unless he is in some way restrained, he will dispose of all his property, so that, in case an allowance should be made to her, she would be unable to collect it from him.

Wherefore she prays for a writ of injunction, to restrain said G. C. from disposing of, or in any way incumbering any of his estate, real or personal, until the end of the next law term of said Supreme Judicial Court.<sup>1</sup>

(Signed,)

N. E. C.

28. *Petition for an Injunction and Receiver, — pending question of Insolvency.*

(Massachusetts.)

G. T. L. *et alii*, Petrs.

v.

G. F. C. *et al.*

And now the petitioners in the above entitled cause come and move this honorable Court that an injunction be issued by the Court restraining and

<sup>1</sup> Provision is made by statute in Massachusetts for an attachment of the husband's property in certain cases of libel for divorce by the wife, in order to secure a suitable support and maintenance for her and the children committed to her. Genl. Sts. c 107, ss. 50, 51, 52.

enjoining B. P. W. and W. R. W., and each of them and their and each of their servants, agents, and attorneys, from making any sale, transfer, conveyance, incumbrance, or disposition of any of the estate, choses in action, property, or effects, real or personal, of the firm of W. & L., or of any of the separate estate of either said B. P. W. or W. R. W., whether consisting of real estate or choses in action, or of any other personal property, and from making any disposal of any of the books of account, papers, documents, vouchers, or evidences of title of either said firm or of said B. P. W. or of said W. R. W.

And your petitioners also move this honorable Court to appoint in this cause some suitable and proper person as Receiver of the estates, choses in action, property, and effects, real and personal, of said firm, and as Receiver of the separate estates, real and personal, of said B. P. W. and W. R. W. and G. T. L., respectively, and of all the books of account, papers, vouchers, and evidences of title of said firm and of said B. P. W. and of said W. R. W. and of said G. T. L., and to decree and order that all said estates, choses in action, property, and effects, real and personal, and said books of account, papers, vouchers, and evidences of title, shall be delivered up into the control and hands of said Receiver.

B. & B.

Att'ys & Sol'rs for the  
Petitioners.

*29. Motion to modify an injunction, with the qualified allowance of the Court thereon.*

Commonwealth of Massachusetts.

S—, ss.

Supreme Judicial Court.

At the Rules.

In Equity.

D. S. v. H. E. *et al.*

And now the said H. E., one of the defendants in said suit, comes, and before answer to said bill of complaint, and waiving no rights in said suit, moves the Court that the Injunction, which has heretofore issued against him in this suit, without notice, be so far modified as to allow him, the said H. E., to collect, settle, or adjust, the notes or obligations in his hands, as agent of the said Columbia Insurance Company, with the parties liable thereon, and give up the same when so settled or adjusted to such parties liable thereon, and in general that the same may be so modified as to allow him said H. E. to settle, collect, and reduce to money in such manner as he shall deem proper the notes, obligations, and evidences of debt

in his said possession, the proceeds thereof to remain in his hands until further order of this Court, or some Justice thereof.

By his Solicitors,  
C. T. & T. H. R.

This motion is so far allowed, that the defendant H. E. is allowed to collect and receive the amount due on notes in his hands and to hold the proceeds under the injunction; but it is disallowed so far as it moves for liberty to compound and compromise said notes.

G. T. B.,  
J. S. J. C.

30. *Petition for an attachment for disobeying an injunction.*

(New Hampshire.)

M——, ss.

To the Hon. A. F., one of the Justices of the Supreme Judicial Court.

A. B., of &c., complains against C. B., of &c., and says that she is the wife of said C. B., and on the —— day of ——, 186—, she caused to be filed, in the office of the clerk of said Court for said county, her libel, praying for a divorce from said C. B., and for other relief for the causes therein set forth; and upon her petition a writ of injunction was duly issued by said justice, on the —— day of ——, enjoining and prohibiting said C. B. from imposing any restraint upon her personal liberty during the pendency of said libel; which was duly served upon said C. D. on the —— day of ——.

Yet the said C. D., well knowing the premises, but wholly regardless of the said injunction, on &c., at &c., with force and arms made an assault upon the said A. B., and beat and bruised her, and imprisoned and deprived her of her personal liberty for the space of —— days, from said &c., to &c., in contempt of said injunction, and against the peace and dignity of the State.

Wherefore she prays that the said C. B. may be held to answer for said contempt, and that justice may be done in the premises.

(Signed,) A. B.

M——, ss., ——, 186—. A. B. personally appeared and made oath that the above complaint, by her subscribed, is in her belief true.

Before me,

N. B., *Justice of the Peace.*

31. *Writ of attachment for contempt.*

[Seal.]

State of Maine.

To the sheriffs of our counties and their deputies.

We command you to attach the body of A. B., of —, in our county of —, so that you have him before our Supreme Judicial Court, next to be holden at —, within and for our county of —, on the — Tuesday of — next, to answer for an alleged contempt in not [*here assert the cause*], and you may take a bond with sufficient sureties, to C. D., the party injured, in the sum of —, conditioned, that he then and there appear and abide the order of the Court. Hereof fail not and make due return thereof and of your proceedings, at the time and place aforesaid. Witness E. S., Justice of our said Court, the — day of —, in the year of our Lord, 18—.

— —, *Clerk.*

When the party is notailable, that part of the writ is to be omitted.

32. *For leave to file a bill of review on the ground of the discovery of new facts.*

[Title &amp;c.]

Showeth,

That your petitioner has exhibited his bill in this honorable Court against X. Y., for the purpose of [*state general object of original bill*] and praying [*state the prayer*].

That the said X. Y. being duly served with process, appeared to the said bill and put in his answer. And the said cause being at issue, was brought to a hearing before —, on &c., whereupon a decree was made in effect as follows:—[*set forth the substance of the decree.*]

That said decree has since been duly enrolled [*or entered of record and judgment thereon rendered*]. And your petitioner further showeth, that since the time of making and entering said decree, your petitioner has discovered new matters important and material in the said cause; particularly [*here set forth the new matters,*] which new matters your petitioner did not know, and could not, by reasonable diligence have known, so as to make use thereof in the said cause, before and at the time of making and entering the said decree.

Your petitioner, therefore, humbly prays, that he may have leave to file a bill of review against the said C. D. for the purpose of obtaining a review and reversal of the said decree; and that all further proceedings under the same may be stayed. And &c.

33. *Petition for leave to file an information in the nature of a quo warranto, and for an injunction forbidding the exercise of the right &c. of certain offices.*

To the Honorable &c.

Humbly show your petitioners, the President, Directors, & Co., of the L. Bank, that by an act of the Legislature of the Commonwealth of M., approved on the — day of —, A. H., E. B., F. K., and their associates and successors, were incorporated by the name of the President, Directors, & Company of the L. Bank, to be located in E. C., in the county of M., being a part of the city of C.; that afterwards at a meeting of the petitioners for said act, called and notified in the manner provided by law, and held on the — day of —, current, the corporation created by said act was legally organized, and A. H., L. H., &c., &c., were duly chosen directors thereof. And thereafterwards, on the — day of —, the said board of directors elected L. H. president of said bank.

And so your petitioners aver, that they are a corporation legally established and organized, and have a right to hold, and exercise, and enjoy the franchise, powers, and privileges granted by said act of incorporation, undisturbed, and without molestation, interference, or intrusion, and no persons other than the above-named A. H., L. H., &c., &c., have any right in law to hold or exercise the office of directors of said corporation. And no person, other than the said L. H., has any right in law to hold or exercise the office of president of said corporation.

And your petitioners further represent, that E. B. and J. M. D., &c., &c. have illegally and against the right of the petitioners, intruded themselves into the office of directors of said L. Bank, and have assumed to hold and exercise, and still do hold and exercise the rights, powers, and duties of directors of said bank, claiming the right to do so under the act of incorporation aforesaid.

And the said E. B. has intruded himself into the office of president of said bank, and has assumed to hold and exercise, and still does hold and exercise the rights, powers, and duties of president of said bank. And the said E. B., as president, and the said J. M. D., &c., &c., as directors, have, and still do, without right, exercise and enjoy the franchise granted by said act of incorporation. Whereby the private right and interest of your petitioners and of the directors and members of said incorporation are injured and put in hazard.

Wherefore your petitioners pray for leave to file an information in the nature of a *quo warranto*, in which the above-named E. B., J. M. D., &c., &c., may be called upon to show by what right they have intruded themselves into the office of directors of said L. Bank, and exercise and claim to exercise the rights, powers, and duties of that office, and the said E. B.

may be called upon to show, by what right he has intruded himself into the office of president of said bank, and claims to exercise the rights, powers, and duties of the said office, and that the said E. B., as president, and the said J. M. D., &c., &c., as directors, may be called upon to show by what right they exercise and enjoy the franchise granted by said act of incorporation before mentioned.

And your petitioners further ask, that, until a hearing and final decision on said information shall be had, an injunction may issue against the said E. B., forbidding him from exercising the rights, powers, and duties of president of said bank, and against the said E. B., J. M. D., &c., &c., forbidding them from exercising the rights, powers, and duties of directors of said bank, and from enjoying the franchise granted by the act of incorporation before mentioned and for general relief.

[*Lechmere Bank v. Boynton*, 11 Cush. 369.]

34. *Petition for transfer of a fund to a person becoming entitled on the death of the tenant for life. (English Form.)*

In Chancery.

Lord Chancellor.

Vice Chancellor.

[or the Master of the Rolls.]

Between . . . . . Plaintiff,  
and  
A. B., C. D., E. F., &c., . . . Defendants.

To the Right Honorable the Lord High Chancellor of Great Britain [or To the Right Honorable the Master of the Rolls.]

The humble petition of the above-named plaintiff [or of the defendant —, or of A. B., of &c.]

[*Introductory statements showing the title of the petitioner.*]

That — Bank £ 3 per cent annuities and £ — reduced annuities are respectively standing in the name of the Accountant-General of this Court on the credit of this cause [to an account entitled “—”], and there is the sum of £ — cash in the bank on the like credit [and to the like account], which sum of cash has accrued in respect of the last [July] dividends on the said bank annuities.

That your petitioner attained his age of twenty-one years on the — day of —, he having been born on the — day of — [as appears by

*the Chief Clerk's certificate on this cause, dated &c.*], and he thereupon became absolutely entitled to the said funds [*or that the said (the tenant for life) died on the — day of —, whereupon your petitioner became absolutely entitled to the said funds*].

That £—— is the apportioned sum or amount in respect of the dividend on the said bank annuities for the current half-year expiring on — which sum is payable to the legal personal representative of the said [*tenant for life*].

Your petitioner therefore humbly prays, that the costs of your petitioner, as between solicitor and client, and the costs of all other proper parties of this application and consequent thereon, may be taxed by the proper taxing master; and that so much of the said £—— Bank £ 3 per cent annuities, standing in the name of the Accountant-General on the credit of this cause, as with the said £—— cash in the bank on the like credit will raise the said costs when taxed [and the duty payable on the funds in Court], (the amount thereof to be verified by affidavit), [and also the said sum of £——], may be sold.

That the residue of the said bank annuities, and any interest to accrue due on the said annuities previously to the transfer thereof, and also the — reduced annuities standing in the name of the said Accountant-General on the credit of this cause, may be respectively transferred and paid to your petitioner, or that your lordship [*or honor*] will make such further or other order in the premises as the circumstances of the case may require.

### 85. *Petition of rehearing and appeal. (English Form.)*

[*Title of causes.*]

To the Right Honorable the *Lord High Chancellor of Great Britain*:

The humble petition of the above-named plaintiff B. E., of &c.  
Showeth,

1. That by the decree dated &c., made by his Honor Vice-Chancellor Kindersley in the first-mentioned cause, it was ordered that &c.

2. That after the said first-mentioned cause had been set down for hearing, but before the same came on to be heard, the said defendants, the executors and devisees in trust of the will of the said testatrix, and the said S. E. and also J. S., filed a special case in this Court, in which they prayed the opinion of the Court whether the appointment made by the said testatrix

A. E., by her said will &c., was or was not a good and valid disposition in fee simple of the estate called &c.

3. That the said special case came on to be heard before His Honor Vice-Chancellor Kindersley, on &c., and his honor, by a decree or order dated &c., declared that the appointment purporting to be made by the said testatrix A. E., by her said will &c., was not a good or valid disposition of the said estate &c.

4. That the said first-mentioned cause came on for a hearing before His Honor Vice-Chancellor Kindersley for further directions, together with a petition which had been presented therein to your lordship by the said J. S., and with the special case.

5. That an order was made by Vice-Chancellor Kindersley, on &c., whereby it was declared that the said testatrix A. E. had not, at the date of her will, any power to appoint by will the estate called &c.

6. That the said order of His Honor V. C. K., dated &c., is, as your petitioner is advised and humbly submits, erroneous, and the same ought to be reversed, and the said order of the — day of —, so far as it declares that the said testatrix had not, at the date of her will, any power to appoint by will the estate called &c., and so far as any other of the directions contained in the said order are or may be inconsistent with the declaration which your petitioner submits ought to have been made with respect to the validity of the said will of the said testatrix A. E. is erroneous, and ought to be reversed.

Your petitioner, therefore, humbly prays your lordship, that the said first-mentioned cause may be reheard before your lordship for further directions on the Master's General Report, and that the said special case in the said second-mentioned cause, and the said petition of the said J. S. may be respectively reheard before your lordship; and that the said order of the — day of —, made by His Honor Vice-Chancellor Kindersley [on hearing the said special case may be reversed, and that the said order of the said Vice-Chancellor, dated &c., made on the rehearing the said special case and hearing the said first-mentioned cause for further directions on the Master's Report, and the said petition of the said J. S.], may be reversed or varied, and that it may be declared that the said will of the said testatrix A. E., dated &c., was a due exercise of the power of appointment reserved to the said testatrix in respect of the said estate &c., and that such directions in the said order of &c., as are inconsistent with these declarations may be reversed or varied so as to give effect to such declarations respectively, [and that the said petition of the said J. S. may be dismissed,] or that the said order may be altered or varied in such manner, or that such other order may be made as

to your lordship may seem meet, and the circumstances of the case may require. And &c.

We humbly conceive that the special case and petition in the above petition mentioned and referred to, and the first-mentioned cause touching the matters in this petition mentioned, are respectively proper to be reheard before your lordship if your lordship shall think fit.<sup>1</sup>

[*Names of Counsel.*]

A. B.  
C. D.

## CHAPTER XIV.

### AFFIDAVITS.

#### 1. *General Form.*

(*English.*)

In Chancery.

Between A. B., . . . . Plaintiff,  
and  
C. D., and E. F., . . . Defendants.

I, G. H., of &c. [*place of residence, and description or addition, or I, A. B., the above-named plaintiff*], make oath and say as follows: [*or if more than one deponent, We, G. H., of &c., and I. J., of &c., severally make oath and say as follows, —*]

1. I, the deponent, G. H., say &c.

2. I, the deponent, I. J., say &c.

The facts and circumstances deposed to by me in the — paragraphs of this affidavit are true and within my own personal knowledge.

The facts and circumstances deposed to by me in the — paragraphs of this affidavit are believed by me to be true, from information which I have received from —.

Sworn &c.

[*See forms of jurats.*]

<sup>1</sup> Tripp's Forms, 82, 83, and notes. By Chancery Rule XIX., in New Jersey, every petition for a rehearing shall set out concisely the special matter or cause on which such rehearing is applied for, and shall be signed by two counsel, except in cases submitted without argument, when it shall be sufficient if signed by one counsel.

*Another General Form.*

In Chancery [*or Equity*].

Before the —.

A. B. } State [*or Commonwealth*] of—, }  
       v. } — County : } ss.: I, X. Y., of —,  
 C. D. }

in said county, merchant, being duly sworn, depose and say, that at &c.

And further this deponent saith not.

X. Y.

Sworn to [*or affirmed*] before me this  
 — day of —, 1865.

L. M., Justice of the Peace.

2. *Affirmation by a Quaker or Moravian.*

I, A. B., of &c., being one of the people called Quakers, make solemn affirmation and say as follows:—

1. I, this affirmant<sup>1</sup> &c.

3. *Affirmation by other persons.*

I, A. B., of &c., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; [*or in Massachusetts, that I have conscientious scruples against taking any oath,*] and I do also solemnly, sincerely, and truly affirm and declare<sup>2</sup> &c.

4. *Common affidavit to be annexed to a bill in Interpleader suit.*

[*Title &c.*]

I, —, the above-named plaintiff, make oath and say, that the bill in this suit [*or the bill hereunto annexed*] is not filed by me in collusion with *any* or either of the defendants in the said bill named, but such bill is filed by me of my own accord for relief in this honorable Court.

<sup>1</sup> Ante, Vol. I. p. 746.

<sup>2</sup> See ante, Vol. I. p. 905.

5. *Affidavit of Secretary to Public Company to be annexed to bill in Interpleader suit.*

[ *Title &c.* ]

I, H. D., of &c., make oath and say, that I am the Secretary of the — Company, and that I do not, and to the best of my knowledge and belief the said — Company does not, nor do or does any members or member thereof, collude with either of the defendants named in the bill hereunto annexed, but such bill is filed by me, on behalf of the said company, of my own accord, for relief in this honorable Court.<sup>1</sup>

6. *Affidavit of the plaintiff that he has not the deeds in his possession, to annex to a bill before it is filed.*

[ *Title &c.* ]

I, T. P., the plaintiff in this cause, make oath and say, that I have not, nor to the best of my knowledge, remembrance or belief ever had, all or any of the deeds, documents, and writings relating to the estate in question in this cause, and mentioned in my bill, exhibited in this honorable Court against the said defendant, nor do I know where the said deeds, documents, and writings, or any of them, now are, unless they are in the custody or power of the above-named defendant.

7. *Affidavit to obtain order to be admitted to sue or defend a suit, in forma pauperis.*

[ *Title &c.* ]

I, A. B., of &c., the above-named plaintiff [or the above-named defendant], make oath and say, that I am not worth the sum of five pounds in all the world, my just debts being first paid, and my wearing apparel and the matter in question in this cause only excepted.

8. *Affidavit of the service of a notice of motion.*

[ *Title &c.* ]

I, Henry Walker, of —, clerk to — Solicitors for the above-named plaintiff, make oath and say, that I did on the — day of —, instant,

<sup>1</sup> See *Bignold v. Audland*, 11 Sim. 23. If the company is plaintiff, say "but such bill is filed by the said company of its own accord, for relief," &c.

serve Mr. —, who is Solicitor of the above-named defendants [or Mr. — and Mr. —, who are Solicitors respectively for the above-named defendants, — and —], with a notice in writing, purporting that this honorable Court would be moved before his Honor —, on the — day of —, then next, or so soon after as counsel could be heard, that &c. [here set forth the notice], by delivering to and leaving with a clerk of the said Mr. —, at his office in —, a true copy of such notice [or in case there should be more than one Solicitor, then add, and also by delivering and leaving with a clerk of the said Mr. —, at his office in —, a true copy of such notice].

9. *Affidavit of personal service of a bill.*

[Title &c.]

On &c., I personally served the above-named defendant, —, with a printed bill of complaint, filed in the above cause, at the — office, on &c., having an indorsement thereon in the form prescribed by —, by delivering to and leaving with the said defendant, —, at —, in the county of —, a printed copy of such bill with such indorsement thereon as aforesaid, which said printed copy was stamped with the proper stamp of — office, indicating the filing of such bill and the date of the filing thereof.

10. *Affidavit of service of an amended bill on the solicitor of the defendant.*

[Title &c.]

On the — day of —, I served Mr. —, the Solicitor of the above-named defendant, —, with a printed bill of complaint filed in the above cause in the — office, on the — day of —, as amended on the — day of —, pursuant to an order dated the — day of —, having an indorsement thereon in the form prescribed by —, by delivering to and leaving with the said Mr. — [or with a clerk of the said Mr. —], at his office situate at —, a printed copy of such amended bill, with such indorsement &c. [as in last form, and introducing the word "amended."]

11. *Affidavit of delivery of interrogatories.*

[Title &c.]

On the — day of — I delivered to the above-named defendant, —, a copy of certain interrogatories for the examination of the said de-

fendant, —, by leaving such copy with the said defendant, —, personally [*or with the wife or servant of the said —, at his dwelling-house*], at —, in the county of —, which said copy of interrogatories was duly stamped and marked as an office copy at the — office, and purported to be a copy of [*or such of*] the interrogatories filed in this cause on the — day of —, for the examination of the said defendant —, [as the said defendant was required to answer.]

12. *Affidavit to obtain order assigning guardian ad litem to an infant defendant.*

[*Title &c.*]

I, —, of —, Solicitor for the above-named [*infant*] defendant, —, make oath and say, that the said — is an infant under the age of twenty-one years, and A. B. of —, is the [*state relationship*] of the said infant, and has no interest in the matters in question in this cause adverse to the said —; and the said A. B. is a proper person to be appointed a guardian of the said —, by whom to defend this suit.

13. *Affidavit of tender of costs where defendant taken under attachment or by messenger.*

[*Affidavit by Solicitor or defendant or his clerk.*]

[*Title &c.*]

1. That by an order made in this cause, bearing date the — day of —, it was ordered that the said defendant T. M., upon his paying or tendering the costs of his contempt in &c., be discharged out of the custody of the Sheriff of — [*or the messenger*], as to his said contempt.

2. I did, on the — day of —, instant, pursuant to such order, tender to Mr. —, who is plaintiff's Solicitor in this cause, the sum of \$—, for the costs of such contempt, but the said Mr. — refused to accept the same or any other sum of money for such costs as aforesaid.

3. I did, on the — day of —, serve the said Mr. — with the said order by delivering to or leaving with his clerk, at the office of the said —, situate at —, a true copy of such order duly passed and entered.

14. *Affidavit as to the correctness of the translation into English of a document in a foreign language.*

[ *Title &c.* ]

1. I am well acquainted with and in the constant practice of translating the Italian language.

2. The paper writing marked with the letter —— produced and shown to me, this deponent, at the time of swearing this my affidavit, contains a correct and faithful translation into the English language of such parts or pages of the original document in the Italian language as are marked respectively with the letters —— and —— also produced and shown to me, this deponent, at the time of swearing this affidavit.

15. *Affidavit as to production of documents pursuant to a decree or order.*

[ *Title &c.* ]

I, C. D., the defendant above-named, make oath and say, that neither I, this deponent, nor any person or persons, for my use, to my knowledge or belief, nor with my privity or consent, have or has, nor ever had, in my, his, or their custody or power, any deeds, papers, or writings, or books of account relative to the matters in question in this cause, save and except the several deeds, books of account, papers and writings mentioned and contained in the schedule hereunto annexed.

*Another form on a different state of facts.*

In Chancery.

[ *Title.* ]

I, ——, of ——, make oath and say as follows:—

1. I say I have in my possession or power the documents relating to the matters in question in this suit set forth in [the first or second parts of the] first schedule hereto annexed.

2. I further say, that I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. I further say, —— [*state upon what grounds the objection is made, and verify the facts so far as may be.*]

4. I further say, that I have had, but have not now, in my possession or power, the documents relating to the matters in question in this suit set forth in the second schedule hereto annexed.

5. I further say, that the last-mentioned documents were last in my possession or power on [*state when*].

6. I further say, — [state what has become of the last-mentioned documents, and in whose possession they now are.]

7. I further say &c. [proceed as in next preceding form.]

NOTE. If the party denies having any, he is to make an affidavit as in the next preceding form, omitting the exception.

16. *Affidavits of mortgagee, or his attorney, having attended to receive mortgage money certified to be due.*

[Title &c.]

1. I did [under and by virtue of a power of attorney dated &c., and executed by the said plaintiff, —, and] in pursuance of the chief clerk's certificate, bearing date the — day of —, made in this cause on the — day of —, personally attend and wait at the — from before the hour of — of the clock in the forenoon of the said — day of —, until after the hour of twelve at noon, being the time and place mentioned in the said chief clerk's certificate, in order to receive from the above-named defendant A. B. the sum of \$ — by the said certificate reported due and directed to be paid to me [or to the said plaintiff] for principal, interest, and costs, in respect of my [or his] mortgage security in question in this cause, at which time the said defendant A. B. did not, nor did any person or persons on his account or behalf attend or pay to me the said sum of \$ —, or any part thereof, nor has he since paid or tendered the same to me [or as I have been informed by the said plaintiff, and verily believe, to the said plaintiff], but the same sum of \$ — still remains due and unsatisfied.

17. *Affidavit to obtain a Ne Exeat.*

In Chancery [or Equity].

Between W. B. R. and others, . . . Plaintiffs,  
and  
H. W. H. . . . Defendant.

Commonwealth of Massachusetts, }  
County of Suffolk, } ss.: I, W. B. R., one of the above-named plaintiffs, being duly sworn, depose and say that the above defendant is actually and justly indebted to the said plaintiffs in the sum of \$ 3,000,<sup>1</sup>

<sup>1</sup> The plaintiff to the writ must either be able to swear positively that so much is actually due, or in some other manner to point out to the Court the sum to be marked on the writ. The only exception is in the case of a suit for an account, in which it will be sufficient, if the plaintiff can swear, that according to the best of his belief, any particular sum at the least would be found justly due to him upon a balance, if the account were taken. Ante, Vol. II. p. 1806; Rice v. Hale, 5 Cush. 238.

for [*here state the ground and circumstances of indebtedment*]; for the recovery of which the said plaintiffs did, on the — day of —, file their bill of complaint in the office of — for said county of Suffolk, against the said defendant; to which said bill the said defendant has not yet answered; and being so indebted, the said defendant has lately declared in the presence of each of the plaintiffs, and informed them, and this deponent verily believes, that he will without delay leave this Commonwealth and go to live and reside in parts beyond the seas [*or in California or Texas*], out of the jurisdiction of this Court. And this deponent has no doubt, but verily believes, that if the said defendant should be allowed to depart out of this Commonwealth, the plaintiffs' debt will either be entirely lost to them, or the recovery thereof greatly endangered.

W. R. B.

Sworn &c.

[*Certificate of allowance.*]

18. *Affidavit to obtain writ of distringas on stock.*

[*Title &c.*]

A. B. [the name or names of the party or parties on whose behalf the writ is sued out] v. The President, Directors, and Company of the Bank of —.

I, A. B., of —, do solemnly swear, that, according to the best of my knowledge, information, and belief, I am [*or if the affidavit is made by a solicitor, C. D., of —, is*] beneficially interested in the stock hereinafter particularly described, that is to say, [*here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing.*<sup>1</sup>]

19. *Affidavit of waste being committed, to ground an injunction to stay waste.*

[*Title &c.*]

I, A. B., the above-named plaintiff, make oath and say, that the defendant, C. D., in the month of —, 186—, did pull down and destroy part of the dwelling-house and outbuildings at —, of which this deponent is seized in fee simple, as this deponent is advised and believes, and for the recovery whereof this deponent is proceeding in the Court of —. And

<sup>1</sup> Ante, Vol. II. p. 1793.

this deponent further says, that the said C. D. has felled and cut down several timber and timber-like trees and saplings, not proper to be felled, growing in and upon the lands and grounds belonging to the said mansion-house, and the grounds and premises, at &c., aforesaid, and has carried away such trees, and sold the same to J. H., a ship-builder, at &c. And this deponent further says, that the said C. D. is now cutting down and felling the trees and thriving timber standing for ornament, shade, and shelter, in and about the mansion-house and buildings aforesaid, and in the avenues, walks, &c., belonging thereto; and this deponent further says, that the said C. D. threatens that he will cut down, carry away, and sell all the timber and timber-like trees, ornamental and thriving timber and saplings, standing and growing in and about the said estate at &c., aforesaid; and this deponent verily believes that the said C. D. will carry his threats into execution, unless restrained by this honorable Court, to the great loss and damage of this deponent.

A. B.

Sworn &c.

20. *Affidavit identifying a person named in a certificate of his death or burial.*

[*Title &c.*]

1. I was well acquainted with A. B., named in the paper writing or certificate marked with the letter D., produced and shown to me at the time of swearing this affidavit.

2. The said A. B. is the same person as A. B., of &c., named in the certificate of the Chief Clerk of his Honor Vice-Chancellor —, dated<sup>1</sup> &c.

21. *Affidavit verifying the parish Register as to the burial of a party in a cause, and his identity.*

[*Extract from book.*]

1. That the above [*extract*] is a true copy of an entry made in the books kept by the Vicar of the parish of &c., for registering burials in the said parish, so far as the same relates to the burial of the said A. B.

2. I, this deponent, carefully examined and compared the same with the said book.

3. The said A. B. is the same person as A. B. mentioned in &c., as I know, having been acquainted with the said A. B. in his lifetime.

<sup>1</sup> See Tripp's Forms, 106, note.

22. *Affidavit of the execution of a deed by attesting witness.*

[ *Title &c.* ]

1. I was present on the —— day of ——, and saw —— sign, seal, and deliver the parchment writing or deed dated &c., marked with the letter ——, produced and shown to me at the time of swearing this my affidavit.

2. The name or signature “——” thereto set and subscribed, as the party executing the said deed, is the proper handwriting of the said ——, and the name —— set and subscribed as the person witnessing the execution thereof by the said ——, is of the proper handwriting of me this deponent.

23. *Affidavit of execution of deed by a person not a witness to the execution.*

[ *Title &c.* ]

1. I am well acquainted with the handwriting of the defendant F. G. H. [having often seen him write].

2. The indenture dated &c., and purporting to be made between the said defendant F. G. H., &c., produced to me at the time of making this affidavit, marked with the letter —— was, as I believe, duly executed by the said defendant F. G. H., and the name “F. G. H.” set and subscribed at the foot of said indenture is of the proper handwriting of the defendant F. G. H.

3. I am also well acquainted with the handwriting of J. E. B., of &c., and I say that the name of “J. E. B.” set and subscribed to the said indenture, as the attesting witness to the execution thereof by the said F. G. H., is the proper handwriting of the said J. E. B.

24. *Affidavit of a witness being of the age of seventy years to obtain order to examine him de bene esse.*

[ *Title &c.* ]

I, A. B., &c., Solicitor for the above-named plaintiff in this cause, make oath and say :

1. That C. D., of &c., is a very material witness for the said plaintiff in this cause, and that he cannot without the evidence of the said C. D., as I am advised and verily believe, safely proceed to a hearing of this cause.

2. The said C. D. is now of the age of seventy years, as I have been informed by him and verily believe, [and he appears to this deponent to

be very weak and infirm, and in a declining state of health ; on which account, and from his advanced years, he is, in all probability, not likely to live long.<sup>1</sup>]

**25. *Affidavit by plaintiff or defendant to obtain an order for a commission or for an examiner to examine witnesses abroad.***

**[ *Title &c.* ]**

1. This cause is now at issue, and I, this deponent, am desirous of proceeding therein.

2. I have several witnesses to examine in support of the case made by my bill [or answer], who now live and reside at —— and —— [and particularly A. B., C. D., and E. F.], who can, as I believe, prove the truth of the allegations made in the —— paragraphs of my bill [or answer].

3. The several witnesses above-named are, as I believe and am advised, material and necessary witnesses for me in this cause, and without their testimony I cannot safely proceed to a hearing ; but that with the testimony of those witnesses, I am advised and believe, I shall be able to make a good defence in this cause [or can establish my right to relief in this cause].

**26. *Affidavit in support of application to amend bill.***

***Where application is before<sup>2</sup> filing replication.***

1. That the draft of the prepared amendments to the plaintiff's bill has been settled and approved, and signed by counsel.

2. That such amendment is not intended for the purpose of delay or vexation ; but because the same is considered to be material for the case of the plaintiff.

If after<sup>3</sup> replication filed, or after the expiration of four weeks from the time when the answer, or the last answer, is deemed sufficient, add : —

3. That the matter of the proposed amendments is material, and could not, with reasonable diligence, have been sooner introduced into such bill. [*Show also the materiality of the amendments, and state such facts as will enable the Court to judge whether reasonable diligence has been used.*]

<sup>1</sup> See Tripp's Forms, 61, 108, and notes ; *Mackenna v. Everitt*, 2 Beav. 189, 191 ; ante, Vol. I. p. 954.

<sup>2</sup> Ante, Vol. I. p. 419, 420 ; Tripp's Forms, 183.

<sup>3</sup> Ante, Vol. I. p. 422 ; *Stuart v. Lloyd*, 3 M. & J. 181.

27. *Affidavit in support of application for leave to file voluntary answer, after the expiration of the time limited.*

I, A. B., of &c., the solicitor [or managing clerk to Mr. C. D., of &c., the solicitor] for the above-named defendant E. F. in this suit, make oath and say as follows :—

1. That the printed bill of complaint [or the subpoena] in this suit was served on the said defendant E. F., on the — day of —, 186—, as I have been informed by the said defendant and verily believe.

2. That I am advised by counsel and believe, that it is material and necessary for the defence of the said defendant E. F. in this suit, that he should put in [a plea or] an answer to the said bill.

3. That instructions to settle such [plea or] answer were laid before counsel on the — day of —.

4. That it is not desired to put in such [plea or] answer for the purpose of delay, and that further time, until the — day of — next will, in my judgment, be necessary to put in such [plea or] answer.

28. *Affidavit that no answer has been delivered, so that a decree may be entered on the bill as confessed.*

(N. Hampshire.)

In the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. & a.

I, A. S., solicitor of said plaintiff, testify and say that no plea, answer, or demurrer to the bill of complaint of T. P. v. T. D., T. M., and T. A. has been delivered to me by either of said defendants, or left at my dwelling-house or place of business, or has otherwise come to my hands or knowledge.

A. S.

H—, ss. —, —. Personally appeared A. S., and made oath that the above affidavit, by him subscribed, is true.

Before me,

N. B., Clerk.

29. *Affidavit of having discovered new matter for a bill of review.*<sup>1</sup>

[Title &c.]

I, J. C. P., the defendant, make oath and say, that since the time of pronouncing the decree in this cause, I, the deponent, have discovered

<sup>1</sup> See affidavit in *Baker v. Whiting*, 1 Story, 218, 220.

new matter of consequence in the said cause, particularly that the plaintiff on &c., did &c. [*state the substance of the newly discovered matter*], which I, this deponent, could not possibly know, so as to make use thereof, in my defence, at the time of pronouncing the said decree.

30. *Affidavit by an executor, to obtain order to restrain action after decree.*

[*Title &c.*]

1. I have, in the first schedule hereunder written, set forth a true, full, and particular account of all and singular the sum and sums of money received by or come to the hands of me this deponent as the executor of T. T., the testator in the pleadings of the cause named, or to the hands of any other person or persons by my order, or for my use.

2. I have really and *bona fide* paid, as executor of the said testator, the several sums of money mentioned and set forth in the second schedule hereunder written, in discharge or part discharge of the debts of the said testator, and for his funeral expenses.

3. I have *not* any sum or balance whatever on account of the personal estate of the said testator in my possession or power [*or I have the balance or sum of \$—— and no more, on account of the personal estate of said testator, in my hands*].

4. The outstanding personal estate and effects of the said testator consist of the several debts and other particulars, so far as I am enabled to set forth the same, specified in the third schedule hereunder written.

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The first schedule referred to by the foregoing affidavit.

---

The second schedule referred to by the foregoing affidavit.

---

The third schedule referred to by the foregoing affidavit.

31. *Affidavit verifying receiver's account.*

In Chancery.

[*Title.*]

I, ——, of ——, the receiver appointed in this cause, make oath and say as follows:—

1. I say that the account contained, from page —— to page ——, both inclusive, in each of the two several books marked with the several letters A and B, produced and shown to me at the time of swearing this my affidavit, and purporting to be my account of *the rents and profits of the real estate and of the outstanding personal estate of ——, the testator* [*or inter-*

tate], *in this cause*, from the — day of —, 186—, to the — day of —, 186—, both inclusive, doth contain a true account of all and every sum and sums of money received by me, or by any other person or persons by my order, or to my knowledge or belief, for my use, on account or in respect of the *said rents and profits accrued due on or before the said — day of —*,<sup>1</sup> *or on account or in respect of the said personal estate*, other than and except what is included as received in my former account [*or accounts*] sworn to by me.

2. And I further say, that the several sums of money mentioned in the said account hereby verified to have been paid and allowed, have been actually and truly so paid and allowed for the several purposes in the said account mentioned.

3. And I further say, that the said account is just and true in all and every the items and particulars therein contained, according to the best of my knowledge and belief.

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## CHAPTER XV.

### JURATS.

#### 1. *To bill or answer or affidavit.*

*Common Form.]*

Commonwealth of Massachusetts, }  
Essex County. } ss.: On this — day of —,  
before me personally appeared A. B., and made oath that he has read the above bill [*or answer or affidavit*], subscribed by him [*or has heard it read*], and knows the contents thereof, and that the same is true, of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

J. C. P., Master in Chancery  
[*or Justice of the Peace*].

#### 2. *To the answer of a foreigner.*

On this — day of —, 1865, before me personally appeared A. B., who is a foreigner and unacquainted with the English language, and made oath to the above answer before me by the interpretation of A. H. P. (who was previously appointed and sworn by me to make true interpretation of the same), and thereupon the said A. B. did on his oath aforesaid declare that the matters contained in his said answer are true &c., &c.

E. L., Master &c.  
[*or Justice of the Peace*].

<sup>1</sup> The day to which the account is made up.

3. *The affidavit of the Interpreter to be annexed to the answer. The following is the form in 1 Fowler Exch. Pr. 429.*

Between A. B., Plaintiff, }  
and  
C. D., Defendant. }

E. F., of —, in the county of —, gentleman, maketh oath and saith, that he is well acquainted with the French and English languages, and that he hath truly and correctly read over and translated to the defendant the bill filed by the plaintiff in this cause; and this deponent further saith, that he hath read over to the defendant the translation in the French language of the English answer of the said defendant hereunto annexed; and this deponent further saith, that the same is a just and true translation of the English into the French language, which said answer is also hereunto annexed. E. F.

Sworn &c., &c. Before me,  
M. H., *Master in Chancery.*

4. *To the answer of a corporation.*

The answer of the defendants, the President, Directors, and Company of the Bank of America, was taken this — day of —, in the year —, before me, under the common seal of the said corporation, as by their said seal affixed appears. 2 Fowler, 416, 422.

M. H., *Master in Chancery.*

ENGLISH FORMS OF JURATS.

5. *Where answer or affidavit sworn at Record and Writ Clerk's Office.*

Sworn [by the defendant A. B., or by the defendants, or deponents A. and B.] at the Record and Writ Clerk's Office, Chancery Lane, in the county of Middlesex, before me, —.

6. *If before a London Commissioner.*

Sworn &c., at my house [or Chambers], No. —, Field Court, Gray's Inn, in the county of Middlesex, before me,

A. B.,  
*A London commissioner to administer oaths in Chancery.*

7. *Or if in the country.*

Sworn &c., before me,

C. D.,

*A commissioner to administer oaths  
in Chancery in England.*

8. *Where the guardian of an infant swears to the answer.*

Sworn &c., by A. B., the guardian of the infant defendant — — —, assigned pursuant to an order dated the — — — day of — — —.

9. *Where the defendant or deponent cannot write.*

Sworn &c., at &c., on &c., this answer [*or* affidavit] having been first read over to the said defendant [*or* deponent], who appeared perfectly to understand the same, and made his [*or* her] mark thereto in my presence before me, — — —.

10. *Where a married woman answers separately from her husband.*

Sworn &c., by &c., pursuant to an order dated &c., whereby the said — — — is at liberty to answer separate from her husband, before me, — — —.

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## CHAPTER XVI.

### SUMMONSES.

1. *Summons for leave to amend bill.*

In Chancery [*or* Equity].

Between A. . . . . Plaintiff,  
and  
B. . . . . Defendant.

Let all parties concerned attend at &c., on &c., at — — — of the clock &c., on the hearing of an application on the part of the above-named plaintiff, that he may be at liberty to amend his bill as he shall be advised on or before the — — — day of — — — next.

Dated &c.

[*Name of Judge.*]

This summons was taken out by &c., of &c., solicitors for the said plaintiff.

To the above-named defendant, — — —.

11. *Summons to discharge receiver and vacate recognizance.*

[*Commencement as before.*] An application on the part of the above-named plaintiff, that A. B., the person appointed in this cause to receive &c., be discharged from being such receiver, and that he do forthwith pass his final account, and pay the balance certified to be due thereon into the —, as directed by the decree in this cause, bearing date the — day of — [or to the plaintiff A. B.], and thereupon that the recognizance, dated &c., entered into by the said receiver, and C. D. and E. F., as his sureties, may be vacated, and that for such purpose the proper officer may be ordered to attend his honor, —, with the record of such recognizance.

[*Conclusion as before.*]

12. [*Summons to substitute next friend.*]

[*Commencement as before.*] An application on the part of the above-named plaintiff, that [upon] A. B., of &c., [giving security to answer the defendant's costs up to this time, in case the Court shall think fit to award any such security, to be settled by the judge in case the parties differ,] the said A. B. may be substituted as the next friend for the said plaintiff in the place of the above-named C. D.

[*Conclusion as before.*]

13. *Summons to proceed with receiver's accounts.*

[*Commencement as before.*] An application on the part of A. B., the receiver appointed in this cause, pursuant to the decree dated the — day of — and the order dated the — day of —, to pass his — account of rents and profits [and personal estate].

[*Conclusion as above.*]

## PART III.

### DECREES AND ORDERS.

#### CHAPTER XVII.

##### 1. FORM OF INTRODUCTORY PART OF ORIGINAL DECREE AT THE HEARING OF THE CAUSE. [English Form.]

(a.) Lord Chancellor, *or* Lords Justices, *or* Master } { Date and  
of the Rolls, *or* Vice-Chancellor Kindersley. } { Title.

This cause coming on (the —— day of ——, and) this day to be heard and debated before the Rt. Hon. the Lord High Chancellor of Great Britain [*or* the Rt. Hon. the Lords Justices, *or* the Rt. Hon. the Master of the Rolls, *or* this Court], in the presence of counsel learned for the plaintiff and the defendants [*or, if some of the defendants do not appear, for the plaintiff and the defendants A. and B., no one appearing for the defendants C. and D., although they were duly served with a subpoena to hear judgment in this cause, as by the affidavit of &c., filed the —— day of ——, appears*]; and the pleadings in this cause being opened, upon debate of the matter and hearing [the said affidavit &c., *Enter the evidence, if any, read, and*] what was alleged by the counsel on both sides [*or for the plaintiff and the said defendants, A. and B.*], His Lordship [*or their Lordships, or His Honor, or This Court*] doth [*or do*] order and decree [*or doth declare*<sup>1</sup>] &c.

<sup>1</sup> The Court frequently prefaces its decrees by declarations of matters of fact, or of the right of the parties, and then proceeds to decree the consequent relief. Thus in decrees to execute the trusts of wills relating to real estate, the Court often declares the will to be well proved, and that the same ought to be established and the trusts thereof performed. And so where the Court gives effect to an agreement, or an equitable mortgage, or construes a will or other instrument, or sets an instrument aside, and in other cases. And where a party establishes his right to property, the direction to transfer it to him is often prefaced by a declaration of his title. *Jenour v. Jenour*, 10 Vesey, 568. Until recently, it was not the practice of the Court of Chancery in England in ordinary suits to make a declaration of right, except as introductory to relief, which it proceeds to administer. But by a recent statute the Court was empowered, on a special case being stated for its opinion, to make such a declaration of it, without administering any consequent relief; and by a still more recent statute the Court may in any suit "make binding declarations of right, without granting consequent relief."

Yet neither under this most recent act, nor otherwise, had the Court power to make a

## (b.) [Circuit Courts of the United States.]

Circuit Court of the United States.

In Equity, May Term, 1863.

G. I. F. v. W. W. G.

This cause came on to be heard [*or to be further heard, as the case may be*] at this term, and was argued by counsel ; and, thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz. :<sup>1</sup>

(c.) *If standing for judgment.*

This Court did order that this cause should stand for judgment ; and this cause standing for judgment this day &c., in the presence of counsel learned for the plaintiff and defendants, this Court doth order [*and decree*] &c.

(d.) *Where defendant who has not entered an appearance, or a person not on the record, appears at the hearing, and submits to be bound.*

And X., by his counsel now appearing, and submitting to be bound by the decree and proceedings in this cause, in the same manner as if he had duly entered an appearance to the plaintiff's bill [*or had been originally made a defendant in this cause*], and the plaintiff [*or all parties*] by his [*or their*] counsel consenting thereto, this Court doth &c.

declaration of right, unless it could, if necessary, act on it by granting consequent relief. *Rooke v. L. Kensington*, 2 K. & J. 753 ; *Bristow v. Whittemore*, 1 Joh. 96. See *Baylies v. Payson*, 5 Allen, 473. Neither can the Court make declarations of future rights. *Langdale v. Briggs*, 4 W. R. 703 ; *Jackson v. Turnley*, 1 Drew. 617. Nor merely declare a legal right. *Birkenhead Docks v. Laird*, 4 D., M. G. 732.

But by an Act of Parliament later than those above referred to (22 & 23 Vict. c. 35, s. 30), any trustee, executor, or administrator may by petition or summons apply for the opinion, advice, or direction of the judge respecting the management or administration of the trust property, or the testator's or the intestate's assets, and acting thereon, so far as regards his own responsibility, shall be deemed to have discharged his duty. The practice and mode of proceeding under this act is regulated by the general order, 20 March, 1860. For various declaratory decrees see *Mellick v. President &c. of the Asylum*, Jacob, 180 ; *Hamley v. Gilbert*, Jacob, 354 ; *Colpoys v. Colpoys*, Jacob, 451 ; *Attorney-General v. Dean and Canons of Christ Church*, Jacob, 474 ; *Mole v. Smith*, Jacob, 490 ; *Arnold v. Congreve*, Russ. & My. 209 ; *Barton v. Tollersall*, Russ. & My. 237 ; *Campbell v. Graham*, Russ. & My. 453 ; *Roberts v. Walker*, Russ. & My. 752 ; *Bright v. Rowe*, 3 My. & K. 316 ; *Yates v. Madden*, 16 Sim. 619 ; *Shelton v. Watson*, 16 Sim. 546.

<sup>1</sup> This is the form prescribed by the 86th Equity Rule of the United States Courts, which also provides that "in drawing up decrees and orders, neither the bill nor answer nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order ; but the decree or order shall begin in substance," &c.

## 2. DECREE ON MOTION FOR DECREE.

*(a.) Date and Title.*

Upon motion this day made unto this Court, by counsel for the plaintiff, and upon hearing counsel for the defendants, this Court doth order (and decree) &c.

*(b.) If standing for judgment.*

This Court did order that the said motion should stand for judgment, and the said motion standing this day on the — for judgment in the presence of counsel for plaintiff and for the defendant, this Court doth &c.

*(c.) Decree on interlocutory motion treated as motion for decree.*

Upon motion &c., for [*state shortly the purport of the motion as for injunction or for a receiver in this cause*], and upon hearing &c., and the plaintiff and defendants by their counsel respectively consenting [*or having respectively consented*] that this motion shall be treated as a motion for a decree, this Court &c.

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3. DECLARATORY DECREE ON SPECIAL CASE.  
[English.]

*(a.) [Date and Title.]*

This special case coming on this day to be heard and debated before &c., in the presence of counsel learned for plaintiff and defendants, upon debate of the matter, and hearing what was alleged by the counsel on both sides [*or for &c.,*] this Court doth declare that &c.

*(b.) If the special case stands for judgment.*

This Court ordered that this special case should stand for judgment, and the same standing &c. [Form (c), p. 2194.]

*(c.) Declaratory decree on special case ; Court declining to answer one of the questions.*

Upon reading the probate of the will of J. M., the testator in the special case named, and hearing what was alleged by counsel on both sides, this Court doth, as to the first of the questions submitted for the opinion of the Court, declare that the defendant H. M. does take under the will of the

said J. M., the testator, besides the legacy of \$ —, and the stocks, crops, and farming utensils by the said will specifically bequeathed to him, and a life interest in the farm situated &c., such interest as hereinafter mentioned in the residuary estate of the testator. And this Court being of opinion as to the second of the said questions, that such question cannot properly be decided during the life of the defendant H. M., doth decline to decide the same; And this Court doth, as to the third of the said questions, declare that the said H. M. does take a ratable interest in the residuary estate of the testator in respect of the said legacy of \$ —, but not in respect of the stock, crops, &c., by the said will specifically bequeathed to him. 1 Seton Dec. (Eng. ed. 1862) 34.

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#### 4. ORDER ON SPECIAL PETITION.

##### (a.) [*Date and Title.*]

Upon the petition of &c., on the — day of —, preferred unto &c., and upon hearing counsel for the petitioner [and for &c., *name the respondents, if any*] and upon reading the said petition, this Court doth &c.

##### (b.) *Order on petition as to part adjourned.*

##### [*Date and Title.*]

Upon the petition of &c., on the — day of —, preferred unto &c., the further consideration whereof was adjourned by the order dated the — day of —, and upon hearing counsel for the petitioner and for &c., and upon reading the said order &c., this Court doth &c.

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#### 5. ORDER ON SPECIAL MOTION.

##### (a.) [*Date and Title.*]

Upon motion this day made unto &c., by counsel for &c., and upon hearing counsel for &c., this Court doth &c.

##### (b.) *The like — on cross-motion.*

##### [*Date and Title.*]

Upon motion &c., by counsel for &c., that [*recite plaintiff's notice*], and upon motion &c., by counsel for &c., that &c. [*recite the cross-notice*], and upon hearing what was alleged by the counsel on both sides, this Court doth &c. 1 Seton Dec. (Eng. ed. 1862) 36.

## 6. INTRODUCTORY PART OF ORDER ON CAUSE COMING ON FOR FURTHER CONSIDERATION.

(a.)

This cause coming on for further consideration thereof, adjourned by the decree [*or order*], dated &c., in the presence of counsel for the plaintiff and defendants, upon opening and debate of the matter and hearing the said order and the Master's Report, and what was alleged on both sides, this Court doth order &c. Tripp's Forms (Eng. ed. 1858) 126. See more extended and particular form, 1 Seton Dec. (Eng. ed. 1862) 38.

## 7. USUAL DIRECTIONS.

(a.) *Directions for reference to a Master.*

It is ordered that it be referred to A. B., Esquire, Master &c., to inquire and state to the Court &c. And for the better discovery of the matters aforesaid, the parties are to produce before the said Master upon oath all deeds or books, papers, and writings in their custody or power relating thereto, and are to be examined &c., as the said Master shall direct.

(b.) *Where account directed.*

It is ordered that it be referred to A. B. &c., Master &c., to take an account &c. And for the better taking of the said account, and discovery of the matters aforesaid, the parties are to produce &c., and are to be examined &c., as the said Master shall direct, who in taking said account is to make unto the parties all just allowances.

(c.) *General adjournment to chambers.*

Let this cause [*or matter, or petition, or application*] be adjourned for consideration in chambers.

(d.) *Particular reference. Accounts and inquiries. [Present English Form.]*

Let the following accounts and inquiries be taken and made, that is to say, 1. An account &c.; 2. An inquiry &c.<sup>1</sup>

(e.) *Liberty to state special circumstances.*

And the Master is to be at liberty to state any special circumstances.

<sup>1</sup> Sometimes inquiries are directed expressly "*without prejudice to any question in the cause.*" Sharp v. Taylor, 2 Phil. 809.

*(f.) Separate report.*

And let the Master be at liberty to make a separate report as to any of the matters aforesaid.

*(g.) Directions to settle conveyances &c., in case parties differ.*

And the said Master is to settle the said conveyances, in case the parties differ about the same.

*(h.) Further directions.*

And this Court doth reserve the consideration of all further directions, until after the said Master shall have made his report.

*(i.) Reservation of interest.*

And the Court doth reserve the consideration of &c., and of interest, until after the said Master shall have made his report.

*(j.) Reservation of costs.*

And this Court doth reserve the consideration of &c., and of the costs of this suit, until after the said Master shall have made his report.

*(k.) Direction for taxation and payment of costs &c.*

Let the Master tax all parties their costs in this suit. And it is ordered that such costs, when taxed, be paid as follows, viz.: the plaintiffs' costs to Mr. —, their solicitor, &c.

*(l.) Further consideration adjourned; liberty to apply.*

And let the further consideration of this [matter and] cause be adjourned; and any of the parties are to be at liberty to apply (to this Court) as they shall be advised.

*(m.) The like with liberty to apply in chambers as to particular matter.*

And let any of the parties be at liberty to apply in chambers for the appointment of a receiver [or for, or as to &c., as the case may be], and otherwise (generally) to apply as they may be advised.

*(n.) If costs are partly dealt with by the decree.*

And let the further consideration of this cause, and of the costs of this cause not hereinbefore otherwise provided for [or disposed of] be adjourned. — Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 56.

**(o.) *Payment of money by one party to another.***

Let the (defendant) A., on or before the — day of — (or within — days after service of this decree [or order]) pay to the (plaintiff) B. the sum of \$ —, appearing by &c. [or certified by &c.] to be due to him in respect of &c., [or on the taking the accounts directed by &c.]

**(p.) *Payment of interest.***

***To life tenant or his representatives.***

Let the interest during the life of (the plaintiff) A. to accrue on the &c., be, from time to time, as the same shall accrue due, paid to (the plaintiff) A. [and, if so ordered, or to his legal personal representatives], or until further order.

**(q.) *To trustees.***

Let the interest to accrue on &c., be, from time to time, as the same shall accrue due, paid to the plaintiffs A. B. &c. (or any two of them), upon the trusts of the indenture of the — day of —, until further order.

**(r.) *To corporation aggregate.***

Let the interest to accrue on &c., be, from time to time, as the same shall accrue due, paid to the [insert the style or title of the corporation], until further order.

**(s.) *Or to the treasurer.***

Let the interest to accrue on &c., be, from time to time, as the same shall accrue due, paid to A. as the treasurer of [insert style or title of the corporation], and to the treasurer for the time being of the said [corporation], to be verified by affidavit, until further order.

**(t.) *To married woman for her separate use.***

Let the interest during the life of A., the wife of B., to accrue on &c., be, from time to time, as the same shall accrue due, paid to the said A. for her separate use, until further order.

**(u.) *To husband in right of his wife.***

Let the interest during the life of A., the wife of B., to accrue on &c., be, from time to time, as the same shall accrue due, paid to the said B. in right of his said wife, until further order.

## 8. TAXATION AND PAYMENT OF COSTS BETWEEN PARTIES.

*(a.) Taxation and payment of costs by one party to another.*

Let the plaintiff (defendant) A. pay to the defendant (plaintiff) B. his costs of this cause (suit) [*or application*], such costs to be taxed by &c. (in case the parties differ.)

*(b.) Plaintiff to pay one defendant's costs, and recover them with his own from a co-defendant.*

Tax the costs of the defendant A. of this cause (suit); And let the plaintiff B. pay to the defendant A. the amount of the said costs when so taxed. Tax the costs of the plaintiff of this cause (suit); And let what the plaintiff shall pay for the costs of the defendant A. be added to his own costs when so taxed; And let the ——— certify the total amount thereof; And let the defendant E. pay to the plaintiff B. the amount so to be certified.

*(c.) Costs of application to be costs in the cause.*

And let the costs of the plaintiff [*or petitioner, or defendant, or applicant, or all parties*] of this application be costs in this cause.

*(d.) Petition dismissed with costs.*

This Court doth order that the said petition be dismissed with costs, to be paid by the petitioner A. to the said B. and C. [*name respondents to receive costs*], and taxed by the ———, (in case the parties differ.)

*(e.) Tax and pay costs without prejudice how ultimately to be borne; Costs made charge.*

Tax the costs of the plaintiffs and defendants of this cause (suit); and let the plaintiff C. pay to the defendants respectively the amount of their said costs, when taxed, without prejudice to any question how such costs are ultimately to be borne; And let the plaintiffs' costs, and also the costs which the plaintiffs, or any of them, shall so pay to the defendants, be a lien (charge) on the estate of the testator in question in this cause.

*(f.) No costs given on either side.*

The Court doth not think fit to give any costs of this cause [*or application*] on either side.

*(g.) The like ; as to part.*

And this Court doth not think fit to give any or either side, as to so much of the costs of this cause [or application] as have been occasioned by &c. [or as relate to &c., or so far as such costs have been increased by &c.<sup>1</sup>]

*(h.) Taxation of plaintiff's and defendant's respective costs of parts of suit, involving apportionment of general charges, with set-off.*

Tax the costs of the plaintiff in this cause (suit), except so much thereof as relates to the claim set up by him to &c. ; Tax the costs of the defendant, of so much of this cause (suit) as relates to the said claim ; And let the Taxing Master, set off the said costs of the plaintiff and of the defendant when so respectively taxed, and certify to which of them the balance after such set-off is due ; And let such balance be paid by the party from whom to the party to whom the same shall be certified to be due.

*(i.) Direction to like effect.*

Tax the costs of the plaintiff of this suit (cause), except so far as such costs have been occasioned by the plaintiff setting up a claim to the whole of the debt in the bill mentioned. *Hardy v. Hull*, 17 Beav. 355.

*(j.) Taxation of defendant's costs of suit with set-off of part, caused by defendant's wrongful claim, including costs of co-defendants ; husband and wife ; on bill to redeem.*

Tax the costs of the defendant P. (*mortgagee*) of this cause, except so far as the same relates to the claim made by him in respect of the sum of \$ — charged by the deeds dated &c., in the bill mentioned, as a sum advanced to the plaintiff and to H., his wife since deceased, on the occasion of making and executing the said deeds over and above and beyond the sum of \$ — secured by the two promissory notes dated &c., in the bill mentioned ; Tax the costs of the defendants, W. and wife, of this cause ; And let the plaintiff O. pay unto the defendant W., the costs of the said defendant W., and of his said wife when so taxed ; And the &c., is to inquire and certify how much of such costs of the defendant W. and wife (if any) have been occasioned by (relate to) the defendant P.'s said claim in respect of the said sum of \$ —, and he is also to tax the plaintiff his costs of

<sup>1</sup> See 1 Seton Dec. (Eng. ed. 1862) 94, note.

this cause so far as the same have been occasioned by (relate to) the said claim of the defendant P. in respect of the said sum; And let such costs of the plaintiff when so taxed, together with what he shall have paid to the defendant W. for the costs of the said defendant W., and of his said wife (if any), occasioned by (relating to) the said claim of the defendant P. in respect of the said sum of \$ —, be set off against the said costs of the defendant P. when taxed; And the &c., is to certify to whom, after such set-off, the balance is due; And let the party from whom such balance shall be certified to be due pay the amount thereof to the other party. *Orange v. Pickford* (1860), 1 Seton Dec. (Eng. ed. 1862) 88.

*(k.) Taxation of costs, except so far as increased by particular claim, not involving apportionment of general charges.*

Tax the costs of the plaintiff (defendant) of this cause (suit), except so far as such costs have been increased by the plaintiff's claim to &c. [or plaintiff by his bill seeking &c., or defendant setting up &c., or claiming &c.]; Tax the costs of plaintiff (defendant) of this cause (suit) so far only as the same have been increased by the said claim [or the plaintiff by his bill seeking &c., or by the defendant setting up &c., or claiming &c.] Directions for set-off and payment of balance. 1 Seton Dec. (Eng. ed. 1862) 89.

*(l.) Costs up to a particular time.*

Let the plaintiff A. pay to the defendant B. his costs of this cause (suit) up to this hearing [or this time, or the — day of —, (when the defendant offered by &c., in writing, to pay the amount sought to be recovered by the plaintiff &c.)]; such costs to be taxed &c.

*(m.) Costs to be paid by plaintiff and defendant respectively from and to a particular time. — Set-off.*

Tax the costs of the plaintiff G. of the first-mentioned cause, up to the — day of —, the date of the letter from the solicitor for the plaintiff in the second-mentioned cause in his said affidavit referred to; And tax the costs of the defendant L., incurred in the first-mentioned cause since the said — day of —, and also his costs of this application; And let the &c., set off such costs of the plaintiff G. and of the defendant L., respectively, when so taxed, and certify to whom after such set-off the balance is due; And let the party from whom such balance shall be certified to be due pay the amount thereof to the other party. *Gresham v. Luke* (1860), 1 Seton Dec. (Eng. ed. 1862) 89.

*(n.) Cost of suit taxed, and set off against sum due.*

Tax the plaintiff his costs of this cause &c.; and let such costs, when taxed, be set off against the sum of \$——, which the plaintiff by his bill admits to be due from him to the defendant under the agreement dated &c., in the bill mentioned, with \$—— for interest on the said sum at the rate of \$—— per cent per annum, from the —— day of —— to the —— day of ——, the date of the filing of the bill, making together \$——; and let the &c., certify to whom, after setting off the said costs when so taxed against the said sum of \$—— the balance is due; and let the party from whom the balance shall be certified to be due, within —— months [*or days*] after the date of the ——'s certificate, pay the amount thereof to the other party. Liberty to apply. *Radley v. Ingram* (1860), 1 Seton Dec. (Eng. ed. 1862) 89.

*(o.) The Master to look into petition and affidavits, and if improper or of unnecessary length, to distinguish and set off costs.*

Direction to take account of what is due to petitioner under certain deeds, and to tax his costs of the application. —— “And in taxing such costs, the Taxing Master is to look into the said petition and affidavits, and distinguish such parts thereof as shall appear to him to be (what parts thereof are) (improper or) of unnecessary length; and ascertain the costs, if any, occasioned to the respondents by such part or parts thereof as may be distinguished as being (improper or) of unnecessary length; and let such last-mentioned costs be deducted from the petitioner's costs of this application; and let the balance be certified &c. *Re Radcliffe* (1856), 1 Seton Dec. (Eng. ed. 1862) 89, 90.

## 9. TAXATION OF COSTS AND PAYMENT OUT OF FUNDS IN COURT.

*(a.) Taxation of costs and payment to Solicitors. [English Form.]*

Refer it to the Taxing Master to [*or let the Taxing Master*] tax the costs of the plaintiff and the defendants [*or all parties*] of this cause (suit). (*If ordered, as between solicitor and client*) [*or if ordered as to executor or trustee only, the costs of the defendant A., the executor, or trustee of &c., as between solicitor and client*]; and let so much of the £—— Bank 3ℓ per cent Anns. standing in the name of the Accountant-General in trust in this cause [the account of &c.] as with the £—— cash in the Bank, to the credit of this cause [the like account] will raise such costs when taxed, be sold; And let out of the money to arise by such sale and the said cash, such costs be paid as follows, viz. the costs of the plaintiffs to Mr.

——, their solicitor, the costs of the defendant A. to Mr. ——, his solicitor, and the costs of defendant B. &c., to Mr. ——, and Mr. ——, his solicitors, or either of them.<sup>1</sup>

(b.) *Taxation of costs of Application ; payment out of cash.*

Tax the costs of the petitioner (applicant) and of &c., of this application [*if so ordered*, and relating thereto, and consequent thereon], [*If so, as between solicitor and client*]; and let such costs, when taxed, be paid out of the \$ —— cash in the ——, to the credit of this cause [the account of &c.] in manner following &c.

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10. DECREES BY CONSENT.

(a.) This Court &c., doth by consent order (and decree) &c.  
or

And the plaintiff and defendants A. and B., [*or all parties*] by their counsel consenting to the following decree [*or order*], this Court doth order (and decree) &c.<sup>2</sup>

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11. DECREE APPROVING AND CONFIRMING CERTAIN ACTS DONE AND MATTERS AGREED UPON BY THE PARTIES.

(a.) (*After reciting the acts done and matters agreed upon, proceed*): It is therefore ordered, adjudged, and decreed, as and for the final decree in this cause, that the said statement of the said accounts and of the result of the said accounts, and the payments aforesaid to the said Samuel B. Parsons, and the receipts, releases, and discharges aforesaid, of and by the said Samuel B. Parsons to the said trustees, George Howland Jr., Matthew Howland, and Edward W. Howland, be, and the same hereby are approved, ratified, and confirmed.

T. M., J. S. J. C.

<sup>1</sup> See *Frost v. Belmont*, 6 Allen, 164, 165. For a *form of decree* respecting costs out of the fund, in a creditor's suit, and giving special and discriminating directions, see *Mason v. Codwise*, 6 John Ch. 297, 301.

<sup>2</sup> The second form should be used where the order contains several directions, all of which are consented to; in other cases, the words "by consent" should preface the particular directions consented to. 1 Seton Dec. (Eng. ed. 1862) 21; 2 ib. 1120.

## 12. RESERVING CASE FOR FULL COURT (MASS.).

(a.) Heard on bill, answer, evidence, and exhibits, and reserved thereon for the consideration [and determination] of the full<sup>1</sup> Court.

*Another Form.*

(b.) Heard on demurrer (to the bill), and reserved for the consideration of the full Court.

## 13. APPEAL (MASS.).

(a.) Heard: bill dismissed; plaintiff appeals.

## CHAPTER XVIII.

## GENERAL SUBJECTS OF EQUITY.

## 1. ACCOUNT.

(a.) *General account.—Original decree.—Injunction continued.—Judgment to stand as security.*

This Court doth order and decree, that it be referred to A. B., Master [or one of the Masters] &c., to take an account of all dealings and transactions between the plaintiff and the defendant; for the better clearing of which account the parties are to produce &c., as the Master shall direct, who, in taking of the said account, is to make unto the parties all just allowances, and what, upon the balance of the said account, shall appear to be due, from either of the parties to the other of them is to be paid by the party from whom to the party to whom the same shall be reported to be due, within —— months after the said Master shall have made his report, and the same shall have been confirmed [or as the said Master shall direct]. And it is further ordered, that the injunction formerly granted in this cause, for stay of the defendant's proceedings at law, be in the mean time continued, and the defendant's judgment is to stand a security for payment of what, if anything, shall appear to be coming to him on the balance of the

<sup>1</sup> "Full Court" is uniformly the language of the General Statutes of Massachusetts. Cases are sometimes reserved for the "whole Court." But it is believed that there is no authority for this in any existing statute of the Commonwealth.

said account ; and the Court doth reserve the consideration of the costs of this suit and of all further directions, until after the said Master shall have made his report, when either side is to be at liberty to apply &c.

*(a.) Direction for allowing stated account.*

And if in taking the said accounts the said Master shall find that any account has been settled between the said parties, the same is to stand [or not to be disturbed].

*(b.) On bill by part owner of a ship, for an account.*

This cause coming on &c., this Court doth order, that an account be taken of all dealings and transactions of the defendant J. M'G., from the 1st day of October, 1838, in relation to the ship or vessel called the "Jane," in the pleadings mentioned, and of all sums which have been received and properly expended by the said defendant in respect thereof, and in taking such account, all just allowances are to be made ; and in case it shall appear that any account has been settled between the parties, [or the parties interested in the said ship in the plaintiff's bill mentioned,] the same is not to be disturbed. And it is ordered that the further consideration of this cause do stand adjourned.

*(d.) Decree setting aside stated accounts, and for general account.*

*(Inter alia.)* This Court doth declare that the three stated accounts, dated &c., ought to be opened and set aside, and doth order and decree the same accordingly ; and it is hereby referred to A. B., Master &c., to take a general account of all dealings and transactions between the plaintiffs, or either of them, and the defendant ; and also of the value of any timber &c. ; in the taking of which account, the Master is to make unto all parties all just allowances ; and for the better taking of said account &c. And it is ordered and decreed, that what shall be found due upon the balance of the said account from any of the parties to the other, or others of them, be (within &c.) paid by the party or parties from whom, to the party or parties to whom the same shall be found to be due ; and it is ordered and decreed that the said defendant do pay to the plaintiffs their costs of so much of the cause as relates to the setting aside the said stated accounts to be taxed &c. And the Court doth reserve the consideration of the rest of the costs of this suit until after the said Master shall have made his report, and the said parties are to be at liberty to apply, as &c.

*(e.) Direction for leave to surcharge and falsify.*

But any of the parties are to be at liberty to surcharge and falsify any of the items and charges therein, as they shall be advised.

*(f.) Accounts to be conclusive, with leave to show errors.*

Let the accounts &c., as between &c., be (considered as) *prima facie* conclusive, but with liberty to either party to show any error therein. *English v. Baring*, penned by Vice-Ch. Kindersley. 1 Seton Dec. (Eng. ed. 1862), 108, 109.

*(g.) Release to stand as to sums received, and account stated, — with leave to surcharge and falsify.*

Declare that the indenture of release of the — day of — shall stand only as a discharge for the several sums of money thereby stated to be retained by or paid to the several parties thereto as therein mentioned; and declare that the account in the said indenture mentioned to be stated, shall stand, with liberty to the plaintiffs and defendants to surcharge and falsify the same. — Directions for account. 1 Seton Dec. (Eng. ed. 1862) 108.

*(h.) Reference to take account of funds in hands of an agent of a foreign principal, said principal being the defendant, and the funds being claimed in equity because they could not be come at to be attached &c. Agent claims lien for his costs &c.*

## Supreme Judicial Court.

SUFFOLK, ss.

March Term, 1857.

In Equity.

D. S., . . . . . Plaintiff,

v.

The Columbia Ins. Co. et al. . . . Defendants.

Whereas, it has been made to appear to this Court, by the answer of the said defendants or otherwise, that at the time of the service of the subpoena and injunction upon the said H. E. in this case, he held in his hands certain funds and promissory notes of the said Columbia Insurance Company, as their agents; and that the said H. E. claims to have a lien thereon for a balance of account claimed by him to be due to him from said Company, and also for the reasonable expenses and counsel fees to which he has been subjected in answering to this and other suits against the said Company, and other liens: —

This Court doth order, that this cause be referred to G. S. H., Esq., as

a Master in Chancery, who, after due notice and hearing of the parties, shall report to this Court what amount of funds and promissory notes or other choses in action belonging to said Company were at the time of said subpoena and injunction, and what now are in the hands or possession of said H. E.; also what balance of account, if any, was due said H. E. from said Company at the date of said service; what reasonable sum for counsel fees or other expenses the said H. E. has paid, or is liable to pay or be at, in answering this and other suits now pending against the said Company; and also any other claims or demands which the said H. E. may have or may claim to hold as a lien upon said funds or property of said Columbia Insurance Company aforesaid.

By the Court,

April 27, 1857.

G. C. W., Clerk.

(i.) *Order of reference to Master; account; rests; state special circumstances, &c.*

On reading the pleadings in the above cause, and hearing the counsel of the respective parties, and on consideration thereof, it is ordered that it be referred to E. W., Esq., as a Master of this Court, to take an account of the dealings and transactions of and between the said parties under the several agreements set forth in the plaintiff's bill, and to state what, upon the balance of said accounts, shall appear to be due from either party to the other.

And the said Master is to make rests in said accounts, and state whether any and what balances were due from either, and which of said parties to the other on the first day of April, A. D. 1850, as well as at the period at which the plaintiff in his said bill alleges said mutual account to have terminated.

And said Master is authorized to state and report to the Court any special circumstances needful for explaining said account and his report thereof, and the evidence as to the time when said mutual account did terminate.

And for the better taking of said accounts &c., the parties are required to produce &c., and to be examined before said Master upon oath, either upon interrogatories or *viva voce*, or by each of said modes, as the said Master may direct.

And all equities and further directions are reserved until the coming in of the report.

And the parties are at liberty to apply to the Court as occasion may require.

[Foster v. Goddard, U. S. C. Court,  
May T., 1857.]

By the Court,

H. W. F., Clerk.

(j.) *The like, with order to report facts.—Objections to draft of report to be deemed waived, unless made in a specified time.*

(*Inter alia.*) “7. He will, on request of either party to this proceeding, report to the Court all the facts upon which he shall base his finding, on either of the points or particulars aforesaid.” “9. All objections to the draft of the report not made to the Master, within seven days after the same shall be ready for the examination of the parties, and notice thereof given, or within such further time as shall be allowed by the Master, shall be deemed to be waived.” [March v. Railroad, 43 N. Hamp. 534, 535.]

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## 2. ESTABLISHING WILL.

### (a.) *Where will proved.*

This Court doth declare, that the will of —, the testator in the bill [*or pleadings*] named, dated &c., is [*or and the codicil thereto, dated &c., are*] well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution; and order and decree the same accordingly.

### (b.) *Where admitted.*

The defendant H., the heir-at-law of —, the testator in the bill [*or pleadings*] named, by his answer [*or counsel*] admitting the due execution of the testator's will, dated &c. [and of the codicil thereto, dated &c.], this Court doth declare, that the same ought to be established, and the trusts thereof performed and carried into execution, and doth order and decree the same accordingly. 1 Seton Dec. (Eng. ed. 1862) 224.

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## 3. DEVISE AND APPOINTMENT.

### (a.) *Devise declared good.*

Establish will. “And declare, that the devises and limitations of the estates contained in the said will are good and valid in law.” *Thellusson v. Woodford*, 13 Vesey, 207; 1 Seton Dec. (Eng. ed. 1862) 257.

*(b.) Declaration that real estate is charged with debts.*

And the testator having by his will charged his real estate with the payment of his debts, this Court doth declare that such debts ought to be made good out of such estate, as equitable assets.<sup>1</sup>

*(c.) Declaration that a devise on a double contingency failed.*

This Court doth declare, that the testator's daughter S., having died in his lifetime, under 21 years of age, but married, the devise over of the two messuages &c. to the defendant E., her heirs and assigns, in the event of the death of the said S. under 21 and unmarried, did not take effect, and the said two messuages descended to the defendant I., the testator's heir-at-law, and that the same are by the said will charged with the testator's debts and funeral expenses. 1 Seton Dec. (Eng. ed. 1862) 257, 258.

*(d.) Appointments by deed and will held valid.*

The Court doth "declare, that the property described and comprised in the indenture of the 1st of September, A. D. 1843, in the pleadings mentioned, became subject to the trusts therein expressed concerning the same respectively, and that the deed poll of the 22d September, A. D. 1843, in &c., operated as an effectual appointment of the property thereby expressed to be appointed, and that it was not revoked by the will of M., in &c., but that such will was a good execution of the power of revocation and appointment reserved by the indenture of the 1st of September, A. D. 1843, and that the same is an effectual appointment of all such parts of the property described and comprised in the indenture of the 1st of September, A. D. 1843, as were not appointed by the deed poll of the 22d September, 1843; And let the trusts of the said will and of the deed poll of the 22d September, A. D. 1843, so far as the same operated respectively by way of appointment of any property comprised in the indenture of the 1st day of September, 1843, be performed and carried into execution." Directions to execute the trusts, pay costs, and distribute estate. *Buckell v. Blenkhorn*, 5 Hare, 131; 1 Seton Dec. (Eng. ed. 1862) 259.

*(e.) Forfeiture declared.*

And the defendant A., by her counsel, admitting that she never has resided, and does not intend to reside, in the mansion-house situate &c., the

<sup>1</sup> For form of a decree in a creditor's suit claiming on a bond, to enforce a trust in the executors to whom the real estate was devised to be sold for the payment of debts. See *Berg v. Radcliffe*, 6 John. Ch. 302, 311.

Court doth declare, that according to the true construction of the will of G., the testator in &c., the said defendant has forfeited the estate for life given to her by the said testator's will; and (by consent of the plaintiff by his counsel) doth declare that such forfeiture takes place from this day. *Dunne v. Dunne*, 3 S. & G. 22; 1 Seton Dec. (Eng. ed. 1862) 262.

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#### 4. DOMICILE AND LEX LOCI.

*Inquiry as to persons entitled, under a gift to heirs, by the law of France.*

And it is ordered [or further ordered] that the said Master do inquire, who by the laws of France were the persons interested and described in the will of R., in the pleadings mentioned, as his paternal and maternal heirs, entitled to share in the succession, living at his decease, and whether such persons are living or dead, and if any of them have died, who are or is entitled to their or his personal property.

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#### 5. DIRECTIONS TO EXECUTOR TO PAY MORTGAGE OUT OF GENERAL ASSETS; COSTS.

SUFFOLK, ss.

Supreme Judicial Court,  
In Equity.

W. T. A., Executor, v. S. B. and others.

*Decree.*

And now after a full hearing and consideration it is ordered, adjudged, and decreed that the said W. T. A., executor of the will of T. W., take out of the general assets of the estate of said T. W., in his hands as such executor, a sum sufficient to pay the debt with interest thereon, which is secured by mortgage on the estate in D. street named in the will, and therein specifically devised in trust; and a further sum sufficient to pay the costs of this suit taxed as between solicitor and client, to wit, the sum of two hundred and twenty dollars for the costs of the said executor, the sum of three hundred and eight dollars and seventy-five cents for the costs of the several respondents, S. B. and J. G. B., and the sum of three hundred and ten dollars for the costs of the residuary legatees; and that no part of the said mortgage debt, interest, or costs be paid out of the real or personal estate specifically devised by said will to the said W. T. A. in trust for the benefit of the said S. B. and J. G. B.

By the Court.

December 27, 1862.

G. C. W., Clerk.

[*Andrews v. Bishop*, 5 Allen, 490.]

## 6. CONSTRUCTION OF WILL, DIRECTIONS TO EXECUTE

This case came on to be heard, and was argued by counsel, and the Court having considered the same do find and declare that the said E. J. is entitled to the household furniture and wearing apparel of the testator, and all his other chattels of personal use, as her own absolute property; that she is entitled to the income, during her widowhood, of all the rest of the personal estate, and that the executor is a trustee by implication to hold the principal, so long as the income is payable to her.

That she is also entitled to the possession and use of the real estate during her widowhood. That the principal of the personal estate, of which the widow is entitled to the income, is intestate estate, the right to which, at the death of the testator, vested in the persons entitled under the statute of distributions; that of this, if there were no children, one half vested in the widow and her interest in the income of her share merged in her vested remainder, and it may be paid to her by the executor when his account is settled, and an order of distribution obtained in the Probate Court.

G. C. W., *Clerk*.

Feb. 12, 1862.

7. DECREE SETTLING THE BASIS AND AMOUNT OF THE PRINCIPAL RESIDUARY FUND OF AN ESTATE; FIXING THE TIME WHEN THE INCOME OF THOSE ENTITLED SHALL BEGIN TO ACCRUE; COSTS AND CHARGES FOR AN AMOUNT AGREED, OUT OF THE PRINCIPAL FUND.

Supreme Judicial Court.

Suffolk, ss.

October Term, 1861.

A. M. K. et al.

v.

W. B. et al.

In Equity.

And now, after full hearing had of the parties in the above-entitled cause, upon the bill, supplemental bill, and answers, and upon due consideration thereof, it is ordered, adjudged, and decreed by the Court, as follows:

That the sums received by the defendants B. and G., executors and trustees, as the profits accruing by virtue of the interest of D. M. K. and his legal representatives in the special copartnership of H., B., & T., and the sums received by said defendants as profits upon leases, as set forth in their supplemental answer, amounting in all to one hundred and fourteen thousand three hundred and seven dollars and two cents (\$114,307.02), are not, and shall not be accounted for or paid over by them as income of the

residue of the estate of said D. M. K., under his will; but that the said sum, together with the sum of fifty thousand dollars, received by said executors as the capital stock contributed by the said D. M. K. to said copartnership, are, and shall be treated and accounted for as a part of the principal fund of the residue of said estate.

And it is further ordered, adjudged, and decreed, that the plaintiff, and the parties entitled under said will to the income of said residue, shall be allowed income upon and out of said fund, from the date of the death of said D. M. K., viz. February 22d, 1860; that for the purpose of determining the amount of said income, the said residuary fund shall be taken and valued as formed at that date; that each and every sum received by said B. and G., as aforesaid, whether as profits or capital, shall be valued by computing and ascertaining what sum, at interest at six per cent per annum, with annual rests, from February 22d, 1860, would amount to the sum actually received at the time when it was received; that the amount of such valuation shall be deemed and accounted for as part of the principal residuary fund, and the amount of interest thereon, from February 22d, 1860, up to the date of the receipt of such sum by the defendants, computed as above, shall be deemed accounted for, and paid over as income to the parties severally entitled to the income of said residue under said will. And that from and after the dates of the said several payments to said defendants, the income thereof actually realized by the defendants, from the investment of said sums, valued as above ordered, shall be accounted for and paid over as income to the several parties entitled thereto under said will.

And it being agreed by the counsel in said cause that the several sums received, as aforesaid, by the defendants, and the dates at which the same were received, and the valuation thereof made up, as aforesaid, as of February 22d, 1860, are as follows, viz.:

	Sums Received.	Valued as of Feb. 22d, 1860.
1860. August 18,	\$21,090.48	\$20,489.22
1861. February 15,	18,688.76	17,650.33
1861. December 31,	24,864.85	22,308.51
1862. April 26,	29,447.64	25,931.51
1862. September 10,	70,307.02	60,495.00
	<hr/>	<hr/>
	\$164,307.02	\$146,874.57

Now, it is further ordered, adjudged, and decreed, that the whole amount to be treated and accounted for by said B. and G., as the principal residuary fund, out of their receipts from the capital and profits of said copartnership, and the profits on said leases, is the said sum of one hundred and forty-six thousand eight hundred seventy-four  $\frac{57}{100}$  dollars (\$146,874.57); and that the whole amount to be paid over or accounted for by

them, as income out of their said receipts, is the sum of seventeen thousand four hundred thirty-two  $\frac{45}{100}$  dollars (\$ 17,432.45); and that said amounts be severally accounted for or paid over, as aforesaid, and that the income actually realized by said B. and G., upon said several sums, amounting to \$ 146,874.57, from and after the receipt and investment thereof by them, be accounted for by them as income of said residuary estate.

And it is further ordered, adjudged, and decreed, that the costs and charges of this suit, including the fees of counsel of the several parties thereto, amounting in all, as agreed by counsel in the cause, to two thousand two hundred and twenty  $\frac{42}{100}$  dollars, be paid by said B. and G. out of the principal fund of said residuary estate in their hands, and be charged to said estate.

By the Court,

G. C. W., Clerk.

November 29th, 1862.

[Kinmonth v. Brigham, 5 Allen, 270.]

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8. DECREE DECLARING THE RIGHTS OF PARTIES UNDER A WILL AND ORDER OF REFERENCE; FURTHER CONSIDERATION RESERVED UNTIL &C.

Bristol, ss.

Supreme Judicial Court.

G. H. Jr., et al., in Equity, v. E. W. H. et al.

This cause came on to be heard at the Term of this Court held at T, within the county of B., and for the counties of B., P., B., and D. County, in the year 1858, upon the bill and answers of those of the defendants who were of full age, and upon the bill and answers by guardian *ad litem*, and the Master's report as to those of the defendants who were minors, and was argued by counsel and was continued for advisement. And after due consideration this Court is of the opinion, and doth accordingly declare, that each and every grandchild, if any, of the testator, G. H., who was or shall be born after the 16th day of March, in the year 1857, the time of the filing of the bill, is not and will not be entitled to the legacy of five thousand dollars provided in and by the will of the said testator for each and every of his grandchildren, but is excluded utterly therefrom.

And it is further declared, that the defendant, S. B. P., as the administrator and next of kin of his minor son, J. B. P., deceased, is entitled to have and recover the said legacy of five thousand dollars provided in and by the will of the testator for the said J. B. P., deceased, and that the said S. B. P. as such administrator and next of kin and heir, is entitled to have and recover one fourth part of the one seventh part of all the rest, residue,

and remainder of the property or estate of the testator which was devised and bequeathed to G. H., Jr., M. H., and E. W. H., and the survivors and survivor of them and their successors in trust among other things, to pay the income thereof or convey the principal to the children of the testator's deceased daughter, S. H. P., the late wife of the said S. B. P., and mother of the said minor child J. B. P., deceased.

And it is further declared, that the minor defendants, S. P., S. H. P., and G. H. P., took their respective legacies of \$ 5,000 each, and upon the death of their mother, each of them an equitable vested interest in the one fourth part respectively of the aforesaid one seventh part of all the rest, residue, and remainder of the property or estate of the testator (which was devised and bequeathed in trust as aforesaid to said G. H., Jr., M. H., and E. W. H.), subject to the power of said trustees as to the payment of the income and the conveyance of the principal as set forth in said will.

And thereupon it is ordered that it be referred to ———, Esq., of ———, appointed a special Master in Chancery by the Court for the purposes of this order, in case the parties cannot agree about the same, to state the account of the said legacy of \$ 5,000, bequeathed to the said J. B. P., and of the said one quarter of the one seventh part of said rest, residue, and remainder of the property or estate of the testator to which the defendant, S. B. P., is entitled as the administrator next of kin and heir at law of the said minor J. B. P., deceased, and to pass upon any other matter which may properly come before him, the said Master as a Master in Chancery, preparatory to entering a final decree, said Master's report to be made and filed in the Clerk's office at T. as soon as may be.

And it is further ordered that all other matters be reserved until the coming in of the agreement of the parties or the Master's report.

*Clerk.*

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**9. DECREE DIRECTING AN ADMINISTRATOR DE BONIS NON HOW TO APPROPRIATE THE RESIDUE OF AN ESTATE IN PAYMENT OF LEGACIES.**

Bristol, ss.

Supreme Judicial Court.

C W. S., Ex'or, in Equity, v. H. B. S. and others.

At Chambers, in Boston, March 4th, 1863.

And now the said C. W. S. having resigned and been removed from the office of executor, and J. W. having been appointed administrator *de bonis non* of the estate of said D. S., with the will annexed, and the said J. W., administrator, having voluntarily come in and made himself the party plaintiff to said bill, in the place of said C. W. S., executor;

It is Ordered and Decreed, that said administrator *de bonis non* with the will annexed, after making provision for the payment of the legacies mentioned in the first nine clauses of the said last will and testament of D. S., appropriate the residue of the estate to the payment of the legacies mentioned in the tenth clause of said will in manner following, viz., that out of said residue he pay the notes mentioned in said clause, as specific legacies chargeable upon said residue; and that he pay the balance of said residue in equal shares to the persons therein mentioned as legatees of the same in equal proportions.

The costs and expenses of this suit to be allowed by the Court and paid out of the funds in the hands of the administrator *de bonis non* with the will annexed.

G. T. B.,  
Ch. Jus. Sup. Jud. Court.

#### 10. DECREE SUPPLEMENTAL TO THE ABOVE, AS TO COSTS.<sup>1</sup>

Bristol, ss.

Supreme Judicial Court.

Charles W. S., Ex'or, in Equity, v. H. B. S. & others.

At Chambers, in Boston, March 13th, 1863.

And now it is ordered and decreed, by way of supplement to the decree passed at Chambers on the 4th day of March, 1863, that the defendants, H. B. S., F. O. S., G. E. S., and C. E. S., be allowed and paid out of the estate of the said D. S., the testator, by the said J. W., the administrator *de bonis non*, their costs as between solicitor and client, the sum of three hundred and fifty dollars; two hundred dollars of which to be paid to their counsel, I. F. R., Esquire, and one hundred and fifty dollars of which to be paid to their solicitors, Messrs. H. & G. E. W.; that the defendants, other than those above-named, and other than said J. W., the administrator *de bonis non*, be allowed out of the estate of said testator by the administrator *de bonis non*, their costs as between solicitor and client, amounting to the sum of one hundred and twenty dollars, for counsel fees and disbursements to the Clerk of Court, and for services of the subpoenas, to be paid to C. I. R., Esq., their counsel; and that the said J. W., the administrator *de bonis non*, be allowed out of the estate of the testator, his costs and expenses of this suit, to wit: the sum of one hundred dollars paid to E. A., his counsel and solicitor.

G. T. B.,  
Ch. Jus. Sup. Jud. Court.

By the Court.

<sup>1</sup> In reference to the authority for this proceeding, see ante, Vol. II. p. 1043, and note 4.

11. DECREE DECLARING VOID CERTAIN TESTAMENTARY PAPERS, NOT BEING EXECUTED ACCORDING TO THE LAW OF THE TESTATOR'S DOMICILE AT HIS DECEASE; ORDERING THE PERSON HOLDING PROPERTY OF DECEASED FOR DISPOSITION ACCORDING TO SAID TESTAMENTARY PAPERS TO PAY OVER TO THE ADMINISTRATOR OF DECEASED.

"That the said Sir J. C., in the bill mentioned, at the time of the writing, and executing the letters mentioned in the said bill, and also at the time of his death, was domiciled in the Province of New Brunswick, and that the letters aforesaid purport to be, and are, Testamentary Papers; and that the legal validity and interpretation thereof are to be governed and adjudged by the laws of said Province; and that the same not being executed so as to be binding as a Will and Testament by the laws of the said Province, they are to be deemed to all intents and purposes as Testamentary Papers, a mere nullity, and of no effect, and that the said Sir J. C. is, therefore, to be deemed to have died intestate; and that the said T. C. G., having been duly appointed administrator of the goods and effects of the said Sir J. C., is entitled to have and hold as such, the assets of the said Sir J. C., now in the hands of the said W. A., as in his answer is stated and admitted. And it is thereupon ordered and decreed by the Court, that the said W. A. do forthwith pay over the same to the said T. C. G., as administrator, deducting therefrom the amount which shall be awarded to him as costs in this cause by the Court, as hereinafter stated. And the Court do further order and decree, that the said W. A. be allowed his reasonable costs, as between client and solicitor, in this cause, to be settled, in case of difference between the parties, by a Master of the Court. And that the defendants, Jacob A. H. and Julia A. H., his wife, do neither receive nor pay any costs; and that the costs of said T. C. G., in the cause, be a charge upon the assets to be received in pursuance of this decree." [Grattan v. Appleton, U. S. Circuit Ct. 3 Story C. C. 767.]

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12. EXECUTION OF POWER MADE GOOD.

(a.) *Defect of execution of appointment by will supplied.*

The Court doth declare, that the will of M. L., widow, deceased, in the pleadings &c., is, notwithstanding the defect in the execution thereof, a valid execution of the power of appointment given her by the will of J. L., the testator in the pleadings &c., and that under such will of the said M. L., her daughters, the defendants, M. B. &c., are entitled absolutely to the &c., and cash carried over in trust in and to the credit of the cause L. v. L., to

"The disputed appointment accounts of the said defendants respectively," as in the pleadings mentioned, subject to the payment thereof of the costs of all parties of this suit *pro rata*. Tax all parties' costs of suit, as between solicitor and client. Liberty to apply. *Lucena v. Barnewall*, 5 Beav. 249; 1 Seton Dec. (Eng. ed. 1862) 287.

(b.) *Inquiry as to exercise of power to appoint.*

And it is ordered [or further ordered], that the said Master do inquire, whether the testatrix executed any deed or deeds other than those mentioned in the pleadings, which operates or operate as an appointment of her real estate, or of any, and what part thereof, pursuant to the power contained in the indenture dated &c., and if so, what is the nature and effect thereof. 1 Seton Dec. (Eng. ed. 1862) 287.

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13. CHARITABLE GIFTS. — ORIGINAL DECREE.

(a.) *Will established, — except as to legacies partly failing.*

The Court doth declare that the will ought to be established &c., except as to so much of the charity legacies thereby bequeathed as are directed to be paid out of the money to arise by sale of the testator's real and leasehold estates, or to come out of any mortgages or chattels real belonging to the testator, and decree the same accordingly; and as to so much of the said charity legacies as is directed to be paid out of the money to arise by sale of the said freehold and leasehold estates, the Court doth declare that the same is void, as being contrary to the statute passed in the ninth year of the reign of his late Majesty King George II., entitled, "An Act to restrain the disposition of lands, whereby the same became unalienable." 1 Seton, Dec. (Eng. ed. 1862) 329.

(b.) *Will established, — except as to charity devise.*

Establish will. "Except as to the devise of the testator's real estate, in the event in the said will mentioned, to the use of &c., in charity, and declare that such devise is void by the statute &c."

*(c.) Gifts by deed and will in charity declared void.*

The Court doth declare, that the charitable gifts contained in the indenture of &c., and the will of the same date of C., the testator in &c., so far as such gifts are payable out of his real estate or personal estate savoring of realty (which has arisen from or is connected with land) are null and void by the statute &c. 1 Seton Dec. (Eng. ed. 1862) 380.

*(d.) Inquiries as to charities and their treasurers.*

And it is ordered [*or further ordered*] that the said Master do inquire what are the several charitable institutions intended in the residuary bequests contained in the will of the testatrix; and who are the present treasurers of such charitable institutions respectively; and in case there shall be no such treasurer, then who are the trustees or managers thereof respectively.

*(e.) Inquiries as to charities and lands in mortmain.*

And it is further ordered that the said Master do inquire, whether there were or was at the testator's decease, any and what ragged schools or ragged school established, and in operation at S., in the county of G., and whether any and which of them are or is still in operation, and if so, what are or is the nature and constitution of such charities respectively; and that said Master do also inquire, whether there was, at the testator's decease, any and what land belonging to or vested in the college in his will named, called Morden College, Blackheath, sufficient and available for the purpose of a library being built thereon, such inquiries to be without prejudice to any question as to the validity or effect of any bequest contained in the testator's will and codicils, or any of them. 1 Seton Dec. (Eng. ed. 1862) 388.

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14. ADMINISTERING CHARITY. — ORIGINAL DECREE.

*(a.) Decree for scheme for regulating charity; new trustees; inquiry as to value, income, and letting property; rents.*

1. Let a scheme for the future regulation and management (administration) of the charity in the pleadings mentioned, and the application of the present and future income thereof be settled by &c.; 2. And let new trustees be appointed for the management (administration) of the said charity, and of the estates (funds) and property thereof; and let provision be made

in the said scheme for the future appointment of trustees ; and let the following inquiries and account be taken and made, that is to say : 3. An inquiry of what the property of the said charity consists, and where the same is situate, and what is the income and annual value thereof, and how, and by whom, and under and upon what terms, rents, and conditions the same and every part thereof is let, and is now held ; 4. An account of the rents and profits of the charity estates received by the defendants or by any other person &c. ; and of the application thereof from the —— day of ——, the date of the filing the information in this cause. Adjourn &c. *Att'y-Genl v. Ilchester*, 1 Seton Dec. (Eng. ed. 1862) 342, 343.

(b.) *Directions for scheme — for regulating charity.*

Let a scheme for the (future) regulation and management (administration) of the charity in the pleadings (petition) mentioned [and of the estates (funds) and property thereof, or and for the application of the income and the selection of fit objects thereof, or and for filling up any vacancy in the number of the trustees] be settled by &c. 1 Seton Dec. (Eng. ed. 1862) 343.

15. ADMINISTERING CHARITY. — FURTHER ORDER.

(a.) *Order adopting new scheme filed.*

Let the scheme dated &c., which has been approved (and signed) by the &c., and filed in the &c., of this Court, be the scheme for the (future) regulation and management (administration) of the charity in &c., mentioned and the estates (funds or property), and for the application of the income (selection of the objects) thereof [*if required*], and let the several persons in the said scheme named be appointed trustees of the said charity. Directions to tax and pay costs and expenses. 1 Seton Dec. (Eng. ed. 1862) 347.

(b.) *The like. — Another form.*

Let the scheme dated &c., for the (future) regulation and management &c., of the charity in question (and of the estates, funds, and property thereof), which has been approved by the Court, and filed in the &c., of this Court, be carried into effect. 1 Seton Dec. (Eng. ed. 1862) 347.

(c.) *Extract from scheme constituting a charity as to appointment of trustees &c.*

1. The full number of the trustees of the charity shall be 12, and A. B., of &c., and &c., shall be the first trustees; 2. It shall be lawful for any trustee to resign his office by a notice in writing, given to the clerk of the charity, to be appointed as hereinafter mentioned, and independently of death or resignation, the office of any trustee who shall become incapable to act, or shall wholly cease to act, for the period of two years, or shall become bankrupt, or take the benefit of any act for the relief of insolvent debtors, or, except as to any of the above-named persons now residing at a greater distance, shall cease to reside within the county of W., shall *ipso facto* become vacant. 3. Whenever the number of trustees shall be reduced to or below five, the surviving or continuing trustees shall apply in chambers to the Judge of the Court of Chancery, to whose Court these causes may be attached for the appointment of new trustees, and so many new trustees shall be appointed by such Judge as may be necessary to make up the original number of 12 trustees, and directions shall thereupon be given for vesting the property of the charity, other than Government stock (in the whole body of trustees as newly constituted by virtue of such appointment). 1 Seton Dec. (Eng. ed. 1862) 348.

(d.) *Apportionment of costs.*

And let the costs of this application and consequent thereon be apportioned ratably among the said several charities, according to the annual income thereof respectively; and let the amounts apportioned in respect of such costs be paid out of any funds in hand belonging to the said several charities, or out of the annual income thereof respectively. 1 Seton Dec (Eng. ed. 1862) 350.

(e.) *Relator's extra costs of suit out of charity funds.*

Let the defendants, the Coopers' Company, reimburse to the petitioners, the relators, out of the charity funds, the costs and expenses incurred by the petitioners in this cause, over and beyond the costs which have been paid by the defendants, the Coopers' Company, as between party and party; and let the Taxing Master inquire whether any costs and expenses have been properly incurred by the petitioners, other than the costs of this cause, relating to the matters in question, and tax and certify the same respectively; and let the defendants, the Coopers' Company, pay the amount (if any) that the Taxing Master shall certify to have been so properly incurred, out of the said charity funds. 1 Seton Dec. 350.

*(f.) Order to tax costs of Attorney-General separately from relators ; on petition.*

Tax as between solicitor and client, the costs of all parties to these suits, including the costs of the Attorney-General of appearing separately from the relators, of the orders of the 7th day of February, A. D. 1851, and consequent thereon, from the foot of the former taxation, and also the costs of all parties relating to this application ; and let so much of the &c., as will raise the said costs when taxed, be sold &c. ; and let, with the money to arise by such sale, such costs be paid in manner following, that is to say: the costs of the petitioner to Mr. —, the relators' solicitor, the costs of the Att'y-General separately from the relators to Mr. H. H. R., his solicitor, the costs of the defendants, the confrater and poor of the hospital, to Mr. —, their solicitor, and the costs of the defendant V. to Mr. —, his solicitor. 1 Seton Dec. 851.

#### 16. MORTGAGES. — FORECLOSURE.

*(a.) Foreclosure at hearing ; mortgagor in possession.*

The Court doth order and decree, that it be referred to A. B., Esquire, Master &c., to compute what is due to the plaintiff, for principal and interest on his mortgage in the pleadings mentioned, and for his costs of this cause, such costs to be taxed &c. ; and upon the defendant's paying to the plaintiff what shall be reported due to him for principal, interest, and costs as aforesaid, within — months after the said Master shall have made his report, at such time and place as said Master shall appoint, it is ordered, that the said plaintiff do reconvey [resurrender, reassign], the mortgaged premises free and clear of all incumbrances done by him, or any claiming by, from, or under him, [or by those under whom he claims,] and deliver up upon oath all deeds and writings in his custody or power relating thereto, to the defendant, or to whom he shall appoint. But in default of the said defendant's paying to the plaintiff such principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered and decreed, that the said defendant from thenceforth do stand absolutely debarred and foreclosed of and from all [right, title, interest, and] equity of redemption of, in, and to the mortgaged premises. Liberty to apply.

*(b.) Foreclosure, mortgagee in possession ; costs ; repairs ; improvements ; rents and profits ; reconveyance ; default ; infant.*

It is ordered, that the plaintiff's bill do stand dismissed as against the defendant H. S., with costs, and that it be referred to &c., of this Court to

tax the said costs; and it is ordered, that the plaintiff R. H. do pay to the said defendant his costs when taxed, and what the plaintiff shall so pay is to be added to his own costs, to be taxed as hereinafter directed; and it is ordered that it be referred to G. F. C., Esq., Master &c., to take the following accounts, that is to say: 1. An account of what is due for principal and interest on the security of the premises comprised in the indenture [*or deed*] dated &c. 2. An account of all sums of money paid, laid out and expended by the said W. M. or the plaintiff [*transferee of the mortgage*] for fines, fees, and costs &c.; and of all sums of money paid, laid out or expended by the plaintiff in necessary repairs<sup>1</sup> and lasting improvements of the premises comprised in the said indenture [*or deed*] of mortgage of &c.; and in taking the said account, interest is to be computed on the money paid for fines and fees on renewal, and the charges attending the same, and laid out in repairs and lasting improvements, after the same rate of interest as the said mortgage carried; and what shall appear to be due on the said account is to be added to what shall be found due for principal and interest on the said mortgage. 3. An account of the rents and profits of the premises comprised in the indenture [*or deed*] of &c., or which without wilful default of the plaintiff might have been received; and what shall be found due from the plaintiff on taking the said account is to be deducted from what shall be found due to him for principal and interest as aforesaid; and in taking the said accounts, all just allowances are to be made.

And it is ordered, that it be referred to the said — to tax the plaintiff his costs of this suit.

And it is ordered, that upon the defendants or any of them paying to the plaintiff what shall be found to be due to him for principal and interest as aforesaid, together with his costs of this suit, within (*six*) months after the same shall have been certified, at such time and place as shall be appointed, the plaintiff do reconvey and reassign the mortgaged premises for all the plaintiff's interest therein to the defendants or such of them as shall redeem, free and clear of all incumbrances done by the said W. M., or the plaintiff, or any person claiming by, from, or under them or either of them, and do deliver up all deeds and writings in the custody or power of the

<sup>1</sup> In order to entitle the mortgagee to an inquiry as to repairs and lasting improvements, he must establish a case for such inquiry at the hearing. *Sandon v. Hooper*, 6 Beav. 246; *Norton v. Cooper*, 25 L. J. 121. Where two estates, Whiteacre and Blackacre, are mortgaged to A, and afterwards the mortgagor mortgages Whiteacre alone to B, B is entitled to have the securities marshalled, so as to throw A's mortgage, in the first instance, on Blackacre. *Gibson v. Seagrim*, 20 Beav. 614. The plaintiff must take care, neither personally nor by his agent, to receive any rents after the date of the Master's report, otherwise he will not be entitled to obtain the order absolute in case of non-payment at the time appointed, or if he should obtain the order, it will, upon application for that purpose, be discharged.

plaintiff relating thereto, upon oath, to the said defendants or such of them as shall redeem, or to whom they shall appoint.

But it is ordered, that in default of the defendants paying unto the plaintiff such principal, interest, and costs as aforesaid by the time aforesaid, the defendants shall stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises comprised in the said indenture [*or deed*] &c.

And the said decree is to be binding on the infant defendant A. N., unless he, being served with a subpoena to show cause against the same, shall within six months after he should attain his age of twenty-one years, show unto this Court good cause to the contrary.<sup>1</sup> [See Tripp's Forms, 134]

(c.) *Direction to ascertain damages.*

The Master is also to "ascertain what shall be allowed as a sufficient compensation for the damage done to the estate in question by the destruction of the deeds as found by his report, and the amount of what the Master shall find to be proper to be allowed for compensation as aforesaid, is to be set off against what shall be found due for principal and interest," and upon the payment &c., of what shall be found due &c., "after deducting therefrom the amount of such compensation," &c., &c. *Hornby v. Matcham*, 16 Sim. 327.

(d.) *Sale, in default of payment.*

Usual account: Direction for payment to plaintiff, and reconveyance by him. "But in default of defendants paying to the plaintiff &c., it is ordered and decreed that the said mortgaged premises, or a competent part thereof, be sold with the approbation of the Master; and that the money to arise by such sale be applied in payment of what shall appear to be due to the plaintiff for principal, interest, and costs, as aforesaid, and be in the mean time paid into &c., to the credit of this cause." *Adjourn &c.*

(e.) *Final foreclosure.*

Upon motion &c., by counsel for the plaintiff, who alleged that by the decree, dated &c., it was ordered, that it be referred to A. B., Esquire, Master &c., to take an account &c., that in pursuance of said decree the said Master on the — day of —, made his report, and thereby certified that there would be due to the plaintiff for principal and interest on his said mortgage, and for his costs &c., on the — day of —, the sum

<sup>1</sup> With regard to accounts for repairs, lasting improvements, waste, &c., see post, under Forms for Redemption.

of \$ —, which the said defendant was thereby appointed to pay to the plaintiff on &c., at &c., between &c.; that it appears by the affidavit of the plaintiff, filed &c., that he did attend on the said — day of —, at &c., from before the hour of —, till after the hour of — of that day, in order to receive from the defendant the said sum of \$ —, but the said defendant did not, nor did any person on his behalf, attend to pay the said sum, and that the said sum hath not, nor hath any part thereof, been since paid to the plaintiff, but that the whole thereof still remains due and owing; and upon reading the said decree, report, and affidavit, this Court doth order that the defendant do from henceforth stand absolutely debarred and foreclosed of and from all [right, title, interest, and] equity of redemption of, in, and to the said mortgaged premises. [*Take the words of the decree.*]

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### 17. EQUITABLE MORTGAGES.

#### (a.) *Decree for specific performance of agreement to execute a mortgage.*

Declare, that the agreement made &c., and dated &c., ought to be specifically performed and carried into execution; and decree the same accordingly; and let the defendant execute to the plaintiffs a proper deed of mortgage of the estate mentioned in the said agreement, according to the terms of the said agreement; and let all proper parties join therein as the Judge [this Court, or the Master] shall direct; and let such indenture of mortgage be settled by the Judge [this Court, or the Master] &c., in case the parties differ; and let the defendant deliver upon oath to the plaintiff the title deeds and documents of title relating to the said estate which are now in his possession or power; and let the defendant pay to the plaintiff his costs of this cause, (including the costs of such deed of mortgage), such costs to be taxed &c. Liberty to apply. 1 Seton Dec. 443.

#### (b.) *Decree for absolute conveyance, free from all equity of redemption.*

“Declare, that the title deeds relating to the estate in question having been deposited by A., the bankrupt, in the hands of the plaintiff, the plaintiff is entitled to be considered in this Court as if he were a mortgagee of the premises therein comprised; and decree the same accordingly; and let an account be taken of what is due for principal money advanced on the said deposit, and for interest thereon, and for his costs of this suit, to be taxed &c.; and declare, that such principal, interest, and costs are to be considered as a charge upon the said premises; and let, upon the defendant T. paying to the plaintiff, within — months after &c., at such place &c.,

the plaintiff deliver up all deeds &c.; but declare, that in default &c., the plaintiff will be entitled to the said premises, free and clear of and from all right, title, interest, and equity of redemption of, in, and to the same, and to have an absolute conveyance thereof accordingly; and in that case, let the defendant execute such conveyance thereof to the plaintiff to be settled by &c., in case the parties differ." Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 443, 444.

(c.) *Like decree — with receiver.*

Directions to appoint receiver. "And let the person so to be appointed pass his accounts &c., and pay the balances which shall be certified to be due from him to the plaintiff, he, by his counsel, undertaking to account for the same in the accounts hereinafter directed"; 1. Account of what is due to the plaintiff for principal and interest in respect of his equitable mortgage in the pleadings mentioned, and for his costs of suit to be taxed; 2. An account of the balances of the rents and profits of the estates so to be paid to the plaintiff as hereinbefore directed; and let the same be deducted from what shall appear to be due from the defendant for such principal, interest, and costs as aforesaid; and let, upon the defendant paying to the plaintiff what shall be certified to be due to him for such principal and interest as aforesaid, together with the said costs when taxed, after such deductions as aforesaid, within — months after &c., at such place &c., the plaintiff deliver all deeds &c.; but in default of the defendant paying &c., let the defendant convey &c. 1 Seton Dec. (Eng. ed. 1862) 444. For decree in case of infants, see *Price v. Carver*, 3 My. & C. 164; and for decree for conveyance of estates mortgaged by deposit, and foreclosure of estates legally mortgaged, with receiver of the former, *Holmes v. Turner*, 7 Hare, 369, n.

(d.) *Sale; mortgage by deposit.*

"Declare, that the plaintiffs are entitled by virtue of the deposit of the title deeds, and the agreements relating to or accompanying the same in the pleadings mentioned, to an equitable lien or mortgage upon the premises therein mentioned, for securing to the plaintiff the repayment of the principal sum of \$ —, and the interest due thereon; and decree the same accordingly"; Account of what is due to the plaintiffs for principal, interest, and costs of suit, to be taxed; "And upon the defendant's paying to the plaintiffs what shall be certified to be due &c., within — months after &c., at such place &c.; let the plaintiffs deliver up the said title deeds &c.; but in default &c., let the said premises, or a sufficient part thereof, be sold, with the approbation &c., and let the money to arise by such sale

be paid into the &c., to the credit of this cause, and be applied in payment of what shall be certified to be due to the plaintiffs for principal, interest, and costs as aforesaid." Adjourn &c. 1 Seton Dec. (Eng. ed. 1862) 445.

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## 18. LIENS.

### (a.) *Lien on reversion ; conveyance.*

"Declare, that the plaintiff is entitled to a lien in the nature of an equitable mortgage on the defendant's reversion or remainder, in fee simple expectant on the death of W., of &c., of and in the several messuages &c., therein mentioned, for the sum of \$——, and interest thereon ; and let an account be taken of what is due to the plaintiff for principal and interest on the said sum of \$—— ; and let, upon the defendant paying to the plaintiff what shall be certified to be due for principal and interest in respect thereof, within —— months after &c., at such &c., the plaintiff deliver up all deeds &c., or as he shall appoint ; but in default &c., declare that the plaintiff will be entitled to the said reversion of the said messuages &c., expectant upon the death of the said W., free and clear of and from all right, title, interest, and equity of redemption of, in, and to the same ; and to have a conveyance thereof accordingly ; and in that case, let the defendant execute to the plaintiff such conveyance, to be settled &c., if the parties differ." No costs on either side. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 450.

### (b.) *Lien on costs in another suit declared.*

"Declare, that the plaintiffs are entitled to a lien on the costs, and costs, charges, and expenses of the defendant H., in the suits of B. v. J. &c., and are to be at liberty to attend the taxation of such costs, and costs, charges, and expenses, or any part thereof, and from allowing any other person or persons other than the plaintiffs to receive the same." Decree for redemption and foreclosure. 1 Seton Dec. (Eng. ed. 1862) 450, 451. For declarations as to solicitor's lien on title deeds for costs, see *Pelly v. Wathen*, 7 Hare, 351.

### (c.) *Decree, declaring a lien or charge upon an estate for the increased value by improvements made by a bona fide purchaser, for a valuable consideration, without notice of any defects in the title.*

*First interlocutory decree in the case of John Bright, in Equity, against John W. Boyd.* — And now at this term the cause came on to be heard

upon the bill, answer, pleadings, evidence, and other proceedings in the cause, and was argued by counsel. On consideration whereof it is ordered, adjudged, and declared by the Court, that is to say, that it appears to the Court, that the plaintiff is the purchaser, for a valuable consideration, of a defective title, without notice of the defect therein, and that improvements have been made by the plaintiff, or his grantors, on the premises of the defendant, under a mistake of title, and that he is entitled to relief in equity.

That it be referred to a Master, if the parties do not otherwise agree, to ascertain the character and value of said improvements, by whom made, and at what time they were made. Also that the Master ascertain and report of the value of the rents and profits of the land, on which said improvements are made, and state an account thereof. Also, to ascertain and report the present value of the said land without the improvements, and how far the value of said land is increased by said improvements.

And that the Master is to ascertain the foregoing facts, as well by the examination of witnesses as by the examination of the parties, and by other suitable proofs, and to make report thereof to the Court. And that the Master be clothed with all proper powers for the purposes aforesaid, and that further orders and decrees in the premises be reserved until the coming in of the report.

*Report of the Master.*—The Master, to whom it was referred to ascertain the character and value of the improvements on the lot in controversy, by whom made, and at what time they were made, and to ascertain and report upon the value of the rents and profits of the land, on which said improvements are made, and state an account thereof; also, to ascertain and report the present value of the land without improvements; reports that as far as he has been able to ascertain, the improvements upon said lot were made by John E. Marshal. They consist of a double wooden tenement of two stories, which was built in the years 1834 and 1835, and completed in the early part of the summer of 1838; that the said improvements are worth nine hundred and seventy-five dollars, and that the land without the improvements would be worth at this time twenty-five dollars; and that the land, with the improvements, is now worth one thousand dollars, so that the value of the land is increased by the improvements nine hundred and seventy-five dollars, and that, in his opinion, there would have been no rents or profits from said land, if no improvements had been made thereon.

H. W.

Fees \$——.

*Final decree.*—And now, on coming in of the Master's report, it is ordered, that the same be accepted and allowed.

And it is further ordered, adjudged, and declared, that the said improvements, to the value of nine hundred and seventy-five dollars, are a lien upon the whole of the premises described in the plaintiff's bill, and that one quarter part of the said premises stand charged with one quarter of the said improvements.

And it is further ordered, that unless one quarter part of the said sum of nine hundred and seventy-five dollars is paid by the defendant to the plaintiff, by the next term of said Court, one quarter part of the whole of the said premises, with the improvements thereon, shall be sold, and the proceeds thereof, to an amount not exceeding one quarter of nine hundred and seventy-five dollars, shall be paid over to the plaintiff.

And it is further ordered, that all further orders and decrees in the premises be reserved until further order of Court.

[Bright v. Boyd, U. S. C. Court, Mass. Reported 2 Story C. C. 605.]

*(d.) Decree that subsequent assignees pay to former assignees of an insolvent debtor taxes on real estate held by the latter under the assignment, and assessed to same while acting as such assignees, and paid by them after they had ceased to be assignees, on appeal from decree of commissioner of insolvency disallowing their claim.*

J. H. L. v. J. M. H. et al.

And now, upon the pleadings and report of the Judge at Nisi Prius, and after argument by the counsel for the petitioners and for the defendants, the full Court are of the opinion that the Commissioner of Insolvency erred in not allowing to the petitioners the said sum of \$ 160.44, the amount by them paid out for taxes assessed upon real estate vested in them as such assignees for the years 1856 and 1857 as claimed by the petitioners in and by their second account.

It is therefore ordered and decreed that the decree of the Commissioner of Insolvency accepting and allowing said second account, be, and the same hereby is, reformed, so as to allow to the petitioners the said sum of \$ 160.44, and that said sum of \$ 160.44 so paid out for taxes be, and the same hereby is, allowed to the petitioners as claimed by them in said second account.<sup>1</sup>

J. M. H., new assignee, to pay costs to the petitioners out of the funds in his hands as such assignee, and execution to be awarded accordingly therefor against J. M. H., with directions inserted therein for said costs to be paid out of said funds.

[Loud v. Holden, 14 Gray, 154.]

E. A., Solicitor for Plaintiff.

<sup>1</sup> See Form of decree on similar principle, in Murray v. De Rottenham, 6 John. Ch. 52.

19. DECREE FOR DELIVERING POSSESSION OF MORTGAGED PROPERTY  
TO MORTGAGEES.

This cause having been heard upon the bill and answer, and it thereupon appearing to the Court here, that the said Norfolk County Railroad Company did duly make, execute, and deliver to the said R. G. S. and others the said deed of trust and of mortgage, and did also duly make, execute, issue, and deliver to divers persons their bonds for the payment of money and the interest accruing thereon, as in the said bill is particularly set forth; and it further appearing to the Court here, that the said Norfolk County Railroad Company have since failed and neglected, and still do fail and neglect, to pay to the respective holders the interest which has accrued and become due upon said bonds according to the tenor thereof, and to fulfil and comply with the stipulations contained in the same, and that, by reason of such failure and neglect to pay said interest, and to fulfil and comply with such stipulations, the plaintiffs being the present trustees under said deed, are entitled as against said Norfolk County Railroad Company and its successors, to take, have, and hold possession of the whole property conveyed to the said R. G. S. and others in and by the said deed of trust and of mortgage, and to manage and dispose of the same according to law, for the purposes in the said deed specified.

It is, therefore, thereupon ordered and decreed by the Court here, that possession of all the said property, rights, and estate conveyed in and by the said deed to the said R. G. S. and others, be delivered to the plaintiffs by the said Norfolk County Railroad Company and by their officers, agents, servants, and successors, and by any and all persons and corporations, their officers, servants, and agents, who have derived or acquired any right, title, or claim thereto from or under said Norfolk County Railroad Company, or in consequence of any act done or vote passed by them, since the commencement of the proceedings against them upon the bill aforesaid; to be held, managed, and disposed of by the plaintiffs according to law, under the provisions of the deed aforesaid, until the further order of this Court relative thereto.

And it is in like manner further ordered and decreed, that the said Norfolk County Railroad Company, their successors and assigns aforesaid, and their respective officers, agents, and servants, be and hereby are severally required and commanded, forthwith, upon demand of the plaintiffs, to deliver to them possession of the said property, rights, and estate, and of any and every part thereof, and are forbidden and enjoined from thereafterwards intruding or interfering with the plaintiffs in their exclusive use, occupation, and enjoyment of any part of said property, rights or estate, without, or until, the further order of this Court relative thereto. [Shaw v. Norfolk Co. R. R. Co., 5 Gray, 184, 185.]

## 20. MORTGAGES. — REDEMPTION.

*(a.) Decree for redemption and account against mortgages in possession.  
[English Form.]*

*[Among other things.]* The Court doth think fit and so order and decree, that it be referred to Mr. A. B., one of the Masters &c., to take an account of what is due to the defendant, J. R., for principal and interest on his said mortgage, and to tax him his costs of this suit. And the said Master is also to take an account of the rents and profits of the said mortgaged premises come to the hands of the said defendant, J. R., or of any other person or persons by his order or for his use, or which he without wilful default might have received. And what shall be coming on the said account of rents and profits is to be deducted out of what shall be found due to the said defendant, J. R., for principal, interest, and costs. And for the better taking the said account, all parties are to produce &c., as the said Master shall direct, who in taking the said account is to make unto the parties all just allowances. And what upon the balance of the said account shall be certified due to the said defendant, J. R., for his principal, interest, and costs, it is ordered and decreed that the said plaintiff, A. O., do pay the same unto the said defendant, J. R., within — months<sup>1</sup> after the said Master shall have made his report, at such time and place as the said Master shall appoint, and that thereupon the said defendant do re-surrender [re-convey, re-assign] the said mortgaged premises unto the said plaintiff, A. O., or unto such person or persons as he shall direct, free, and clear of all incumbrances done by him or any person claiming, by, from, or under him. But in default of the said plaintiff's paying unto the said defendant, J. R., what shall be so certified due to him for principal, interest, and costs as aforesaid, after such deductions made thereout as aforesaid, at such time and place as aforesaid, it is ordered that the said plaintiff's bill, as against the said defendant, J. R., do from thenceforth stand dismissed out of this Court, with costs, to be taxed by the said Master.

*(b.) Occupation rent.<sup>2</sup>*

And it being alleged, that the defendant has been in the actual possession and enjoyment of the said mortgaged premises since the — day of —,

<sup>1</sup> The decree, upon a bill to redeem, should fix the time within which the redemption is to take place; and should direct that the plaintiff's bill be dismissed with costs, if the money be not paid within the time prescribed. *Waller v. Harris*, 7 Paige, 167; *Shannon v. Speers*, 2 A. K. Marsh. 312. The time to be fixed is within the discretion of the Court, and, being fixed, will not be enlarged. *Perine v. Dunn*, 4 John. Ch. 140; *Novosielski v. Wakefield*, 17 Vesey, 417.

<sup>2</sup> To charge a mortgagee in possession with occupation rent, the mortgagor should al-

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ged premises, and of all other strip and waste by said C. L. committed the said mortgaged premises.

*(g.) Inquiry as to brickmaking on the premises.*

That the Master do inquire what parts of the said mortgaged premises, and from and during what time, have since the said A, deceased, took possession of the said premises, been made use of for the purpose of making bricks and tiles, or for getting earth or clay from which bricks and tiles have been made; and let a fair and proper occupation rent be set for such parts of the said mortgaged premises, having regard to the rent for which such parts would from time to time have let to brickmakers for the purpose making bricks and tiles therefrom.

*(h.) Account of insurance premiums.*

That the Master do take an account &c., including the sums the defendant has paid for premiums on the policy of insurance in the pleadings mentioned, with interest thereon at the same rate as the mortgage carries.

*i. Common form of decree for reference on a bill to redeem against mortgages in possession.*

The Court doth order and decree that it be referred to G. F. C., Esquire, one of the Masters of this Court, to take an account of what is due to the defendant for principal and interest on the mortgage in the pleadings mentioned, and that the said Master do also take an account of the rents and profits of the said mortgaged premises received by the defendant, or by any other person or persons by his order, or for his use, since the — day of —, or which without his wilful default, might have been received there. And what shall be coming on the said account of rents and profits, shall be deducted out of what shall be found due to the defendant for principal and interest. And in case the said Master shall find that the said defendant has been in possession and held the said premises, as owner thereof, then the said Master is to set a rent thereon, and take the account accordingly. And in taking the said accounts, he is to make to the parties all allowances, and particularly for all necessary repairs and lasting improvements which have been made by the defendant on the said mortgaged premises since the —; with the usual directions &c.

*(j.) Another form for the same.*

That it be referred to &c., to take and state an account of the principal and interest remaining due of the debts secured to be paid by the two mort-

gages first above mentioned, and of the rents and profits of the said mortgaged premises which the said A. B., as purchaser thereof, has received or might with ordinary care and diligence have received since the time of the said purchase, on the — day of —, to the time at which the Master shall make his report, and also the value of the beneficial and permanent improvements now existing, if any, which the said A. B. has caused to be put upon the said mortgaged premises, and also the injury, waste, or deterioration of the said mortgaged premises, or in the value thereof, if any, by the said A. B., or any person or persons under him during the time aforesaid.

*(k.) Another form for the same.*

Circuit Court of the United States.

Massachusetts District.

This cause came on to be heard at this term, counsel being present; and thereupon, upon consideration thereof,

It is ordered, that it be referred to C. B. G., Master, to take an account and ascertain and report the amount due on the mortgage described in the plaintiff's bill. And the said Master is to make his report touching the matter hereby referred to him with all convenient speed.

By the Court,

Attest, H. W. F., *Clerk*

*(l.) Dismissal of bill for redemption, on plaintiff's failure to pay the amount found due on the mortgage.*

Upon motion &c., by counsel for the defendant, who alleged that by the decree, dated &c., it was referred to Mr. A. B. &c., to take an account &c. That in pursuance of the said decree, the said Master made his report, dated &c., and thereby certified that there would be due to the defendant for principal and interest on his said mortgage, and for his costs &c., on the — day of —, the sum of \$ —, which the said plaintiff was thereby appointed to pay to the defendant on &c., at &c., between &c.; that it appears by &c., that he did attend &c. [*naming the place and time appointed*] in order to receive from the plaintiff the said sum of \$ —, but the plaintiff did not, nor did any person on his behalf, attend to pay the said sum, and that the said sum hath not, nor hath any part thereof, been since paid to the defendant, but that the whole thereof still remains due and owing; and upon reading the said decree, the said Master's report &c., this Court doth order that the plaintiff's bill do stand dismissed out of this Court with costs, to be taxed &c., and paid to &c., pursuant to said decree.<sup>1</sup>

<sup>1</sup> See *Stuart v. Worrall*, 1 Bro. C. C. 581. Where a party fails to redeem within the

(m.) *Decree for surrender of mortgaged premises on payment of amount found due on the mortgage; in default of payment, bill dismissed, and redemption barred.*

Circuit Court of the United States, }  
Massachusetts District. } May T., 1855.

W. H. v. W. Bank.

This cause was thence continued to the present term of this Court, when same came on for a hearing upon exceptions taken to said Master's report, and on a Bill of Revivor, and thereupon and in consideration thereof, it is ordered, adjudged, and decreed, that if said T. B. H., S. B. H., J. C. S., and E. S., named in said Bill of Revivor, shall, within sixty days from the fifteenth day of May, A. D. 1855, pay or cause to be paid to said defendant, the sum of fifteen thousand six hundred and seventy-five dollars and ninety-nine cents, with interest thereon, from this fifteenth day of May, A. D. 1855, to the day of payment, together with the defendant's costs of this suit taxed at ———,

Thereupon said defendants shall surrender said mortgaged premises unto the said T. B. H., S. B. H., J. C. S., and E. S., and to their heirs and assigns forever, free of and discharged from said mortgage and all incumbrances created or made by them. But in default of the payment of said sums of fifteen thousand six hundred and seventy-five dollars and ninety-nine cents with interest thereon, and of three hundred and sixty and  $\frac{41}{100}$  dollars costs of suit, on or before the said time of payment as aforesaid, it is ordered and decreed, that said bill shall stand dismissed out of this Court, and that no person claiming from or under said original plaintiff shall have any further claim or right to redeem said premises from the force and effect of said mortgage, set forth in the plaintiff's bill.

(n.) *Decree for redemption where an absolute deed was shown to be a mortgage by parol evidence.<sup>1</sup>*

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the Court, that the said conveyance, by way of release and assignment of the premises, in the pleadings mentioned, to the said Martin Luther (the defendant), be and is hereby declared to be, not an absolute conveyance and assignment, but a mere mortgage of the premises to the said defendant, and as such the plaintiffs are entitled to redeem the same, time allowed, it is usual to dismiss the bill, which amounts to a bar of the equity of redemption. *Perine v. Dunn*, 4 John. Ch. 140.

<sup>1</sup> See *Henry v. Clark*, 7 John. Ch. 40; *Wyman v. Babcock*, 2 Curtis C. C. 386.

upon payment of all moneys and just claims, which the said defendant hath secured to him by and in the same premises, in virtue of and under the same conveyance and assignment; and it is hereby decreed, that the plaintiffs be allowed to redeem the same accordingly.

And it is further ordered, adjudged, and decreed, that it be referred to a Master for this purpose, to take an account in the premises, making all due allowances and charging the defendant with all receipts and profits, with the usual powers of Masters in such cases, to examine the parties, and to take other evidence in the premises, and to call for all proper vouchers and papers, and to make report of his doings &c.

And all further orders and decrees are reserved until the coming in of the Master's report. [Taylor v. Luther, 2 Sumner, 237, 238.]

(o.) *Decree declaring an absolute deed to be a mortgage, given to secure a debt; absolute sale by the mortgagee, without notice, destroying the equity of redemption, a constructive fraud; defendant (mortgagee) to pay to the mortgagor the value of the land and of the rents and profits, after deducting the principal and interest of the debt for which the deed was made.*

U. States Circuit Court,  
Massachusetts District, } Oct. T., 1855.

This case having been heard on the bill of complaint filed therein, and upon the answer of the defendant thereto, and upon the proofs exhibited by the respective parties, and the parties having been fully heard by their counsel this Court doth declare the conveyance of N. W. to said defendant, bearing date the twentieth day of November, in the year one thousand eight hundred and twenty-eight, to have been a mortgage to secure the debts the amount whereof is named in said deed as the consideration of the same, and that at the times of the sales of the lands in said conveyance set forth by the defendant, the assignor of the plaintiff had the right to redeem the same.

And doth declare that the absolute sales and conveyances by defendant of said lands to *bona fide* purchasers for valuable consideration without notice, was a constructive fraud upon the rights of the assignor of plaintiff, and that therefore he became entitled as against the defendant personally to an account of the value of the lands and of the rents and profits thereof, and, after deducting the amount of principal and interest due said defendant, to the payment of the balance.

And doth declare that the plaintiff as assignee has succeeded to those rights.

And said cause having been referred to a Master to take the necessary

accounts in pursuance of the foregoing declaration of this Court, and said Master having made his report in the premises, and the same being duly considered, the respective parties heard therein, this Court doth order and decree that there be paid by said defendant to said plaintiff the sum of twelve thousand and sixty-seven dollars and nine cents, together with costs. [Wyman v. Babcock, 2 Curtis C. C. 386.]

*(p.) Outlines of a decree, declaring plaintiffs entitled to redeem against purchaser with notice of plaintiffs' right, and a reference in regard to the amount due on the mortgages, the rents and profits, the improvements and waste.*

The Court doth declare, that the plaintiffs, who are judgment and mortgage creditors, are entitled to redeem the seventy acres covered by the two mortgages, upon paying the amount due thereon; and that the claim of G. D., to set up a mortgage debt upon other lands, and a book debt against M. Mc., as a condition of such redemption, was unwarranted and unlawful, inasmuch as the case warrants the presumption and conclusion of law, that these debts were paid; and if not paid, the plaintiffs who were such creditors, and who had no previous notice of them, were not bound to pay them. And the Court doth further declare, that the sale by G. D. was unlawful and fraudulent, because the notice of sale contained a false assertion, that these seventy acres were covered by a third mortgage, which was upon other lands only, and because no place of sale was specified in the notice, and because the power to sell under the third mortgage upon other lands was, in itself, null and void, and because the sale was made, after a tender was made of the sum due upon the two mortgages on the seventy acres, with the costs. And the Court doth further declare that W. G. D., the defendant, was a purchaser chargeable with notice of the right of the plaintiffs, and of the tender; and even without notice, he would have been a purchaser, under the circumstances of the sale, subject to the right of redemption of the plaintiffs, and that J. Mc., the original plaintiff, died, seized in fee of the said mortgaged premises, subject to the incumbrances chargeable thereon; and that the other plaintiffs are his lawful heirs, entitled to the same rights. And the Court doth order and decree that it be referred to a Master, to state and report the amount due on the two mortgages, and the rents and profits which have, or might have been received by the defendant W. G. D., and the value of the beneficial and permanent improvements now existing, and made by him thereon, and the injury, waste, and deterioration, which he may have committed, or suffered to be done &c.<sup>1</sup> [Burnet v. Denniston, 5 John. Ch. 43, 44.]

<sup>1</sup> To authorize a recovery for waste in such a case it must be charged in the bill. *Gordon v. Hobart*, 2 Story C. C. 243, 260, 261.

*(q.) Redemption after tender ; payment into Court ; costs ; costs, charges, and expenses.*

“ Let the plaintiffs, H. &c., be at liberty, on or before &c., to pay the sum of \$ 2,000, unto &c. ; and let, upon such payment being made, the defendants, P. &c., deliver up all deeds &c. ; and let an account be taken of what on the 18th day of March, 1853 [*date of tender*], was due to the defendants for principal and interest in respect of their mortgage security &c., and for such (if any) costs, charges, and expenses as are secured thereby, or as they are entitled to, under their said mortgage security, such costs, charges, and expenses to be taxed &c. ; and if it shall appear, on taking the said account, that the amount due to the defendants for such principal, interest, and costs, charges and expenses, on the said 18th day of March, 1853, did not exceed the sum of \$ 1,900 [*the sum tendered*],” — Tax the plaintiffs’ costs of suit, and amount to be deducted, and the balance remaining due to the defendants, for principal, interest, and costs, charges, and expenses, to be paid out of the said \$ 2,000, when paid in, and thereupon defendants to reconvey &c., and the residue of the \$ 2,000, to be repaid to the plaintiffs ; but if the plaintiffs shall not pay in the \$ 2,000, upon the plaintiffs paying to the defendants the amount found due, within — months &c., defendants to reconvey and deliver all deeds &c., but, in default, the plaintiffs’ bill to be dismissed, with costs ; — “ But in case it shall appear on taking such accounts that the amount due to the defendants on the 18th day of March, 1853, did exceed the said sum of \$ 1,900, let subsequent interest be computed from the said 18th day of March, 1853, and added to what shall appear to be due as aforesaid.” And tax the defendants’ costs of suit, and amount to be added ; and what shall be certified to be due to be paid out of the \$ 2,000, and the residue to the plaintiffs ; or if the \$ 2,000 is insufficient, the whole to be paid to the defendants in part payment, and the balance to be paid by the plaintiffs ; and thereupon defendants to reconvey &c. ; And in case the plaintiffs shall not pay in the \$ 2,000, usual directions for redemption, or bill to be dismissed with costs. *Harmer v. Priestly*, 16 Beav. 569 ; 1 Seton Dec. (Eng. ed. 1862) 462.

*(r.) Chattels. Redemption of goods pledged ; overpayment ; assignee.*

It is ordered and decreed, that it be referred to A. B., Esquire, Master &c., to take an account of what remained due on the &c., the date of the last note exhibited in this cause, for principal and interest of the money advanced and lent by the defendant W. to the said C., the bankrupt, on the pledge of the jewels, plate, and effects mentioned in the original note from the defendant to the said C., dated &c., and to compute the interest on so much of the

principal as then remained due. And it is further ordered, that the said Master do likewise take an account of the said jewels, plate, and effects, specified in the last-mentioned note, and see which of them remain in specie in the custody or power of the defendant, and what part thereof hath been sold or disposed of by the defendant. And as to such part thereof as hath been so sold or disposed of, it is further ordered, that the said Master do take an account of the real value thereof; and that the value of such part thereof as hath been so sold or disposed of by the defendant be applied in the first place towards paying the interest, and then towards sinking the principal, of what shall be so found to have been due to the defendant for the money lent or advanced by him as aforesaid. And if upon the balance of the said account, anything shall be found to remain due to the defendant for principal or interest, then on payment thereof by the plaintiff to the said defendant at such time and place as the said Master shall appoint, it is further ordered that the defendant do deliver to the plaintiff such part of the said jewels, plate, and effects as shall be found to remain in specie. But in default of such payment by the plaintiff to the defendant as aforesaid, it is further ordered that the said plaintiff's bill do from thenceforth stand dismissed out of this Court with costs to be taxed by the said Master. And in case it shall appear on the said account that the defendant is overpaid his said principal and interest, then it is further ordered that the said defendant do pay to the plaintiff so much as shall remain due to the plaintiff on the said account, and also to deliver to the plaintiff such part of the said jewels, plate, and effects as shall remain in specie, to be applied as part of the personal estate of the bankrupt, for the benefit of the creditors seeking relief under &c. And the Court doth reserve the consideration of interest of any money that may be found due from the defendant to the plaintiff, in case there shall be any such, and also the consideration of costs, till after the said Master shall have made his report. Liberty to apply.<sup>1</sup>

<sup>1</sup> Bill to redeem goods pledged. See *Kemp v. Westbrooke*, 1 Vesey, Sen. 278; *Slade v. Rigg*, 3 Hare, 35. To recover surplus, overpaid. *Harrison v. Hart*, Com. Rep. 393. Upon payment or tender of amount for which goods are pledged, the property is at once reduced to the pledgor, and they may be recovered by action. 2 Spence, 771. If no time be limited for redemption, pledgor may redeem at any time during his life. *Kemp v. Westbrooke*, 1 Vesey, Sen. 278. Where the pledgee had sub-mortgaged by deposit, the original pledgor was entitled to redeem the goods, on paying the amount due on the original pledge. *Spalding v. Ruding*, 6 Beav. 376, 380.

19. DECREE FOR DELIVERING POSSESSION OF MORTGAGED PROPERTY  
TO MORTGAGEES.

This cause having been heard upon the bill and answer, and it thereupon appearing to the Court here, that the said Norfolk County Railroad Company did duly make, execute, and deliver to the said R. G. S. and others the said deed of trust and of mortgage, and did also duly make, execute, issue, and deliver to divers persons their bonds for the payment of money and the interest accruing thereon, as in the said bill is particularly set forth; and it further appearing to the Court here, that the said Norfolk County Railroad Company have since failed and neglected, and still do fail and neglect, to pay to the respective holders the interest which has accrued and become due upon said bonds according to the tenor thereof, and to fulfil and comply with the stipulations contained in the same, and that, by reason of such failure and neglect to pay said interest, and to fulfil and comply with such stipulations, the plaintiffs being the present trustees under said deed, are entitled as against said Norfolk County Railroad Company and its successors, to take, have, and hold possession of the whole property conveyed to the said R. G. S. and others in and by the said deed of trust and of mortgage, and to manage and dispose of the same according to law, for the purposes in the said deed specified.

It is, therefore, thereupon ordered and decreed by the Court here, that possession of all the said property, rights, and estate conveyed in and by the said deed to the said R. G. S. and others, be delivered to the plaintiffs by the said Norfolk County Railroad Company and by their officers, agents, servants, and successors, and by any and all persons and corporations, their officers, servants, and agents, who have derived or acquired any right, title, or claim thereto from or under said Norfolk County Railroad Company, or in consequence of any act done or vote passed by them, since the commencement of the proceedings against them upon the bill aforesaid; to be held, managed, and disposed of by the plaintiffs according to law, under the provisions of the deed aforesaid, until the further order of this Court relative thereto.

And it is in like manner further ordered and decreed, that the said Norfolk County Railroad Company, their successors and assigns aforesaid, and their respective officers, agents, and servants, be and hereby are severally required and commanded, forthwith, upon demand of the plaintiffs, to deliver to them possession of the said property, rights, and estate, and of any and every part thereof, and are forbidden and enjoined from thereafterwards intruding or interfering with the plaintiffs in their exclusive use, occupation, and enjoyment of any part of said property, rights or estate, without, or until, the further order of this Court relative thereto. [Shaw v. Norfolk Co. R. R. Co., 5 Gray, 184, 185.]

## 20. MORTGAGES. — REDEMPTION.

*(a.) Decree for redemption and account against mortgages in possession.  
[English Form.]*

*[Among other things.]* The Court doth think fit and so order and decree, that it be referred to Mr. A. B., one of the Masters &c., to take an account of what is due to the defendant, J. R., for principal and interest on his said mortgage, and to tax him his costs of this suit. And the said Master is also to take an account of the rents and profits of the said mortgaged premises come to the hands of the said defendant, J. R., or of any other person or persons by his order or for his use, or which he without wilful default might have received. And what shall be coming on the said account of rents and profits is to be deducted out of what shall be found due to the said defendant, J. R., for principal, interest, and costs. And for the better taking the said account, all parties are to produce &c., as the said Master shall direct, who in taking the said account is to make unto the parties all just allowances. And what upon the balance of the said account shall be certified due to the said defendant, J. R., for his principal, interest, and costs, it is ordered and decreed that the said plaintiff, A. O., do pay the same unto the said defendant, J. R., within — months<sup>1</sup> after the said Master shall have made his report, at such time and place as the said Master shall appoint, and that thereupon the said defendant do re-surrender [re-convey, re-assign] the said mortgaged premises unto the said plaintiff, A. O., or unto such person or persons as he shall direct, free, and clear of all incumbrances done by him or any person claiming, by, from, or under him. But in default of the said plaintiff's paying unto the said defendant, J. R., what shall be so certified due to him for principal, interest, and costs as aforesaid, after such deductions made thereout as aforesaid, at such time and place as aforesaid, it is ordered that the said plaintiff's bill, as against the said defendant, J. R., do from thenceforth stand dismissed out of this Court, with costs, to be taxed by the said Master.

*(b.) Occupation rent.<sup>2</sup>*

And it being alleged, that the defendant has been in the actual possession and enjoyment of the said mortgaged premises since the — day of —,

<sup>1</sup> The decree, upon a bill to redeem, should fix the time within which the redemption is to take place; and should direct that the plaintiff's bill be dismissed with costs, if the money be not paid within the time prescribed. *Waller v. Harris*, 7 Paige, 167; *Shannon v. Speers*, 2 A. K. Marsh. 312. The time to be fixed is within the discretion of the Court, and, being fixed, will not be enlarged. *Perine v. Dunn*, 4 John. Ch. 140; *Novosielski v. Wakefield*, 17 Vesey, 417.

<sup>2</sup> To charge a mortgagee in possession with occupation rent, the mortgagor should al-

*(e.) Account ; sale ; dissolution.**Decree for account of dealings and transactions.*

The Court doth order and decree that it be referred &c. to take an account of all partnership dealings and transactions between the plaintiff and the defendant (from the — day of —) ; and that what, upon taking the said accounts, shall appear to be due from either of the said parties to the other of them, be (within one month from the date of the Master's report) paid by the party from whom, to the party to whom, the same shall be certified to be due [or adjourn further consideration &c.]. Liberty to apply. 2 Lindley Partn. (Eng. ed. 1860) 828 ; see also *ib.* for the method of taking an account under such decree.

*(f.) House &c, where business was carried on declared partnership assets ; sale and accounts ; receiver.*

This Court doth declare, that the leasehold house &c., at &c., in the plaintiff's bill mentioned, and comprised in the indenture of lease, dated &c., and in the indenture of assignment, dated &c., and wherein the partnership between the plaintiff and the defendant has been carried on, are assets of the said partnership ; and it is ordered that the said leasehold property, together with the trade-fittings and fixtures thereon, be sold with the approbation of &c., — money to be paid into Court ; account of partnership dealings and transactions. Adjourn &c. Liberty to apply in chambers for receiver. *Raiker v. Pike*, 1 Seton Dec. (Eng. ed. 1862) 543.

*(g.) Decree for dissolution from time of notice ; renewed lease partnership assets ; accounts ; inquiry as to most beneficial mode of sale, and if as a going concern, or as wound up ; sale.*

This Court doth “ declare, that the partnership in the pleadings of their causes mentioned, called the — Co., is to be deemed dissolved as from the — day of —, the date of the notice of dissolution given by Messrs. —, as the solicitors and on behalf of the defendants F. and M., as in the pleadings mentioned [or as from the — day of —, the date of the filing of the plaintiff's bill in this cause ; and doth order and decree the same accordingly] ; And the Court doth further declare, that the renewed leases of the freehold mines, lands, and premises, in such leases respectively comprised, granted by &c., the respective lessors, to the defendants, dated respectively &c., are, in equity, assets of the said partnership firm ; And the Court doth order and decree that it be referred &c., to take and make the following account and inquiry, that is to say : 1. An account of

the partnership dealings between &c., all severally deceased, and the plaintiff and defendants respectively, since the grant by &c. of the lease, dated &c., and including in such account or dealings with the partnership assets, property, and estates, since the date of the dissolution; 2. An inquiry, of what the partnership estates, property, and effects now consist, and in what manner, and upon what terms and conditions the same may be sold most beneficially for all parties interested therein; and whether as a going concern, or as one finally wound up; And it is ordered that the said partnership estate, property, and effects be sold with the approbation of the Master [or Court, or Judge] in such manner, and upon such terms and conditions as shall appear to be most beneficial for the parties interested therein." Receiver. Adjourn &c. 1 Seton Dec. (Eng. ed. 1862) 544, 545.

*(h.) Account of partnership assets on bill by creditor; one partner deceased, survivors bankrupt; inquiry, if deceased's estate was released.*

The Court doth order and decree that the following accounts and inquiries be taken and made, that is to say: 1. An account of what was due at the time of the death of D., deceased, from the partnership of D. &c., (*surviving partners*) to the plaintiff B. and to S. respectively; and also what was due to all such other persons as were creditors of the partnership of D. & Co., at the time of the death of the said D.; 2. An account of what is now due from the said partnership to the plaintiff B. and to S. respectively, and to all such other persons as were creditors of the said partnership at the time of the death of D.; 3. An inquiry, whether the said plaintiffs and creditors, or any and which of them, continued to deal with the said &c., (*survivors*), after the death of the said D.; 4. An inquiry what sum or sums of money was or were paid by the said surviving partners to the plaintiffs and creditors respectively, from the death of D. to the bankruptcy [or insolvency] of the said surviving partners, and what has been since received by the plaintiffs and creditors respectively; 5. An inquiry whether the said plaintiffs and creditors, or any and which of them, have by such subsequent dealing released the estate of D. from the payment of their respective debts, or what, if anything, remains due in respect thereof. Adjourn &c. 1 Seton Dec. (Eng. ed. 1862) 550.

*(i.) Same; against administrators of deceased partner, and surviving partner.*

"Ordered, that it be referred to one of the Masters &c., to take and state an account of what may be due to the plaintiffs upon their demand, stated in the bill, and to all other the creditors of the intestate from him, at the time

of his death, either in his individual character, or as a partner of the house of B. & F., in the pleadings mentioned ; and whether by judgment, mortgage, or otherwise, and the Master is to cause reasonable notice to be given, in his discretion, either personally or inserted in such public paper or papers as he may deem proper, for the said creditors to come in before him and prove their debts ; and he shall fix a peremptory day for that purpose, and such of them who shall not come in and prove their debts by the time so to be limited, shall be excluded from the benefit of this decree ; and such persons, not parties to this suit, who shall come in before the said Master to prove their debts are, before they be admitted creditors, to contribute to the plaintiffs their proportion of the expenses of this suit, to be settled by the said Master.

And it is further ordered, that the Master take an account of the personal estate of the intestate, which hath come to the hands of the defendants (administrators,) or to the hands of any other person by their order or for their use.

And it is hereby ordered, by way of special directions to the said Master, that in taking such accounts, the administrators be not charged with any loss sustained by the act of the defendant F. on the undivided moiety belonging to the intestate, of the goods, chattels, and credits of the said firm of B. & F. in possession of F., by the administrators, and which undivided moiety is stated, in their answer, to have been of the value of 3,601 dollars and 45 cents.

And it is further ordered, that the administrators be charged with the amount, without interest, of assets, being in money and stock, or chattels, and amounting to 665 dollars and 76 cents, and put into the possession of F. by them, as part of the partnership stock between them, and that they likewise be charged with the amount in value of goods received by them upon the insolvency of F. from the said partnership stock, and stated by them to be of the value of 491 dollars ; and that they likewise be charged with the amount in value of assets admitted to be in hand unsold, and stated by them to be of the value of 500 dollars, and that they be charged with moneys received from the debts of the continued partnership formed between them and the said F., and stated by them to amount to 268 dollars.

And it is further ordered, that they be credited with the debts of the partnership of B. & F., for which they have made themselves personally liable, as and for so much money paid by them in a course of administration, and which said debts, with the interest and costs thereon, are estimated by them to amount to 1,583 dollars and 75 cents.

And it is further ordered, in addition to these special directions, that the administrators be charged with all other assets which may have come to their hands, or to the hands of any other person for their use, and be

credited with all other payments and dispositions thereof, by them made in a due course of administration.

And it is further ordered, that the said Master make all just allowances to the said administrators for costs and expenses, but that no allowance be made, under the special circumstances of this case, by way of compensation for their time and trouble.

And it is further ordered, that the said Master also state an account of the location, quantity, and value of the real estate of the intestate, whereof he died seized, and of the amount of the incumbrances thereon; that the Master report in the premises with all convenient speed, and that he report specially on any point, or apply for further directions, if he should deem it proper.

And it is further ordered and declared, that the balance of the said personal estate that shall, upon such accounting, be found to be remaining in the hands of the administrators unadministered, be applied, in the first place, to pay and satisfy judgment debts against the said estate, according to their respective priorities in point of time; and if any assets shall then remain unadministered, that the same be applied to pay the plaintiffs, and all other creditors, if any, who shall have come in under this decree, and proved their debts before the said Master; and if not sufficient to pay all of them, including their costs, then in ratable proportions, according to their respective amounts, and without any preferences or regard to legal priorities.

And it is further ordered, that if any proportion of the debts, and the costs and charges thereon, shall still remain unsatisfied, the plaintiff, or any other of the creditors who shall have so come in under this decree, shall be at liberty to apply to this Court, on the foot of this decree, for a sale of the real estate of the intestate, and that the proceeds arising from such sale be applied to satisfy the proportions of debts that shall remain due, but that all legal incumbrances upon such real estate shall have preference.

And it is further declared, that the right of application, on the part of either of the parties to this suit, for an injunction if requisite to stay proceedings on the part of any creditor at law, either in respect to the personal or real estate, or to stay proceedings on any mortgage upon the said real estate, is left open. And all other and further directions and questions are reserved."

*(j.) Account on bill by party interested under will.*

*Accounts and inquiries as to testator's partnership business.*

Usual accounts of testator's personal estate. "And it is ordered that the said Master do inquire what was the amount of the testator's capital, stock in trade, credits, debts, and liabilities in the partnership trade, or business

of a wholesale dealer in &c., in the pleadings mentioned, on the footing of the deed of &c. ; and whether any, and which, of the debts due to the said partnership at the date of the said deed remain unpaid, and under what circumstances, and whether any, and what steps ought to be taken for recovering the same ; and what is the present amount of the capital, and of the credits, debts, and liabilities of the said business, and how such capital has been derived ; and it is ordered that the said Master do take an account of the business, and of the profits and losses thereof, in each year since the testator's death." Any settled account not to be disturbed ; defendant P. P. (*executor*) to be charged with all moneys received by him ; and be allowed all sums properly paid by him to J. H. (*agent*), for carrying on the business under the will, and having regard to its terms. And that the said Master do also "inquire what sums of money have been paid by the defendant P. P. to the defendant J. P., or to any other person &c., according to the terms of the testator's will ; and whether it will be fit and proper, and for the benefit of the infant plaintiff, that the said business should be carried on, and in what manner and upon what terms." (And let such steps be taken respecting the recovery of the testator's debts and the said business as the Court [*or Judge*] shall direct.) 1 Seton Dec. (Eng. ed. 1862) 553.

(k.) *Decree requiring surviving partner, who has retained the capital stock of the firm and employed it in trade to account for the profits derived from it, proper allowances being made for managing the business.*

It was ordered that it be referred to &c., to inquire whether the concerns of the firm, as they stood at the death of M., were in any manner and how kept separate and distinct from the concerns of the firm that was carried on after his death, and whether the concerns of the new firm were in any manner, and how and to what extent, aided or supplied from the concerns of the old firm ; and it was declared that the shares of profits which, after the death of M., were paid by De T., the defendant, to the junior partners of the concern, were to be considered as in the nature of wages, and to be allowed to De T. in discharge of the account of the profits of the concern ; and the Master was to inquire what would be a reasonable compensation to De T. for his personal attention and credit, which was also to be allowed to him. Upon appeal this decree was affirmed, with liberty for the defendant De T., in the proceedings before the Master, to submit to the judgment of the Master any claims as just allowances which he may be advised ought justly to be made to him, by reason or on account of the management, transacting, and carrying on the business or concern, at any period

or periods by them the said De T., M. De P., and F. G., or any of them, or by them the said M., De P., and F. G., or either of them, or any other person or persons: "and it is ordered, that the said Master do state in his report the facts and reasons upon which he shall have adjudged any allowances to be just allowances, if on the behalf of the plaintiff he shall be requested so to do, and state the facts and reasons upon which he shall have adjudged any allowances prayed not to be just allowances, if he shall be requested on the behalf of the said defendant to make such statements." Affirmed on appeal to the House of Lords. *Brown v. De Tastet, Jacob*, 284.

(L.) *More extended form.*

*Estates purchased with partnership funds distinctly traced, but conveyed to and occupied by one partner, since deceased, declared partnership property; sale decreed to pay off heirs, copartnership debts, and copartnership balance to surviving partner. Estates to be separately sold; separate accounts to be kept by Master; any of the parties at liberty to bid; account of copartnership affairs to be taken, and of what debts remain unpaid, and of the copartnership assets uncollected &c.; account of rents received and value of occupation rent, of repairs, taxes, and insurance, and of liens on the estates; confirmation of report; certain persons allowed as purchasers, and let into possession; decree release as to infants; distribution of proceeds; costs out of the fund.*

Circuit Court of U. States,  
District of Massachusetts. } In Equity.

This cause came on to be heard at this term on the pleadings and evidence therein, and was argued by counsel as well for the defendants as for the plaintiff, and thereupon upon consideration thereof, the Court doth now adjudge and declare it to be well proved that the plaintiff and said O. H., deceased, were copartners in business under the firm of H. & K., in manner and form as stated in the bill, and that said copartnership was dissolved on the 22d day of December, A. D. 1841, by the death of the said O. H.; that the said land in C. square, and the said land in C. street, mentioned in the bill, were purchased and the said building upon the land in C. square was built by said firm out of and with their copartnership funds and for their copartnership uses and purposes;—that the said two parcels of real estate were originally and always held, managed, and intended by the plaintiff and said O. H. as part of their joint copartnership stock, and that the same do now constitute a part of the stock and assets of said late firm; that the said land and dwelling-house near B. street mentioned in the bill

were bought and built by said O. H., with and out of the copartnership funds withdrawn and applied by him to that purpose, secretly and without the knowledge or consent of the plaintiff; that the said appropriation of the copartnership funds to that purpose by said O. H., was a fraudulent appropriation and investment thereof by him in his own name, and that the said dwelling-house and land near B. street ought therefore to be deemed, and is hereby declared, to be part of the copartnership stock and property of said late firm; — that said E. D., deceased, when he took his conveyance of said B. street estate in mortgage from said O. H., had no notice of the said fraud, and was a *bona fide* mortgagee thereof, and his administrator, said E. E. D., one of the defendants, is entitled to the extent of said mortgage to be protected and to have priority of right of payment out of said B. street estate. But that neither the widow, nor the heirs, nor the administrator, nor the private creditors of said O. H., are entitled to any such protection or priority. And it is further considered and adjudged by the Court that the said estate near B. street, as well as said estate on C. square and said estate on C. street, ought to be sold, under the direction of the Court, by a Master, and the proceeds brought into Court, first to apply so much thereof as is necessary to discharge the mortgages thereon, and to apply the residue thereof to the discharge of the debts of the copartnership and the copartnership balance that may be found due to the surviving partner. And the Court doth further order and decree, that it be referred to G. T. C., Esquire, one of the masters of this Court, to cause the said parcel of real estate in C. square, and the said parcel of real estate in C. street, and the said parcel of real estate near B. street, to be separately sold with the approbation of the said Master at such times and places as he shall think fit, to the best purchaser or purchasers that can be got for the same to be allowed of by the said Master, wherein all proper parties are to join as the said Master shall direct. And any of the parties are to be at liberty to bid at said sales for all or any of said estates. And it appearing to the Court that the said estates in C. square and near B. street are encumbered by mortgages or other liens, the said Master is directed to keep and state his accounts so that it may appear by his report what are the proceeds of each of said parcels of real estate. And the Court doth further order and decree, that it be referred to the same Master to take and state an account of the partnership debts and credits at the time of the death of said O. H., and of all subsequent receipts, payments, and disbursements, by the surviving partner on the copartnership account, or in liquidation of its affairs and of the balance due from said O. H. to the plaintiff on the copartnership account. And the said Master is also to inquire and report what copartnership debts, if any, still remain unpaid by the surviving partner, and what copartnership assets, if any, still remain uncollected or unadministered, and the value thereof. And the said Master is also to take an account of

all rents and sums of money, or other things of value received by said O. H. in his lifetime, or by his administrator, widow, or heirs, since his decease, for the occupation of said estate near B. street, or which without the wilful default or neglect of him or them might have been received therefrom, and if the said estate or any part thereof has been occupied by said O. H. in his lifetime, or by his said widow, or heirs, or administrators, since his decease, to fix and report a just occupation rent therefor, and also to take an account of all sums which had been paid by said O. H. in his lifetime, or by any of the parties since his decease, for necessary repairs, taxes, or insurance upon said B. street estate, or on account of the said mortgages thereon. And the Master is to be at liberty to state any special circumstances. And for the better discovery of the matters aforesaid, the said Master may examine either party on oath, and may require the production of the partnership books of said late firm, and all documents and vouchers in the possession of either party touching the premises. And the Court doth reserve the consideration of all further directions until the coming in of the Master's report upon some of the matters herein referred to him, unless either of the parties shall in the mean time apply for further directions, which they are at liberty to do, if occasion shall require.

*Confirmation of Master's Report.*] The report of G. T. C., Esq., the Master to whom it was heretofore referred, by a decree passed in this cause, to sell the three certain parcels of real estate, and also to take and state the accounts in said decree mentioned, having come in and been filed in the clerk's office on the first day of this Term, and no exception having been taken thereto; on motion of Mr. English, the plaintiff's solicitor, it is ordered and decreed that said report do stand confirmed, and that the said M. K. be allowed as the purchaser of said parcel of real estate in C. square, and of said estate near B. street, and said J. L. be allowed as the purchaser of said parcel of land in C. street, at the prices of said estates respectively reported by said Master as the highest bid therefor.

*Final Decree.*] This cause came on to be further heard at this term for directions as to the final decree, and was argued by counsel, and thereupon upon consideration thereof, it was ordered, adjudged, and decreed, that the report of G. T. C., Esq., the Master to whom it was referred to convey the estates sold under the authority of a former decree in this cause, which report was filed in the clerk's office on the 17th day of July, A. D. 1845, do stand confirmed; and the said M. K. be let into possession of the said estate on C. square, and the said estate near B. street; and said J. L. be let into possession of the said estate on C. street. And it is further ordered, that the said defendants, H. O. H. and S. S. H. respectively, do as and when they shall respectively attain the age of twenty-one years, execute,

acknowledge, and deliver sufficient deeds of release of the said estates in C. square, and near B. street, to said M. K., his heirs or assigns, and of the said estate in C. street to said J. L., his heirs or assigns, unless the said H. O. H. and S. S. H. respectively shall, within six months after they shall have respectively attained said age of twenty-one years, show unto this Court good cause to the contrary; and in the mean time it is ordered, that the said purchasers of said estates, and their respective heirs and assigns, do hold and enjoy the said estates by them respectively purchased, and to them respectively conveyed by said deeds of said Master. And the Court doth further order, that the proceeds of said estates now in Court be paid out of Court to the plaintiff or his solicitor, less the fees of the Master, which have been already paid out to him,—the accountable receipts of the plaintiff delivered into Court by him pursuant to a former decree to be delivered back and paid to, and taken by him as money, and that said defendant T. G. do forthwith pay to the plaintiff or his solicitor the said sum of one hundred and ninety-seven dollars and fifty cents found and reported to be due from him to the plaintiff by the first report of the Master, the said plaintiff agreeing to remit ninety-seven dollars and fifty cents thereof to said T. G. And touching the costs, the plaintiff is to recover his costs against the estate of said O. H. deceased, and the same are to be paid to him or his solicitor by the said administrator, widow, and heirs of said O. H., deceased, out of any the goods or estate of said deceased, which may now be in, or may hereafter come to, the hands or possession of them or any of them other or further than such personal property of the said deceased as may have been allowed to said widow before the filing of this bill, by the decree of the Judge of Probate for the county of M., where said deceased last resided. But as between the plaintiff and the said administrator, widow and heirs personally, and as between the plaintiff and the other defendants, the Court doth not think fit to give any costs.

[Kelley v. Greenleaf, 3 Story C. C. 93.]

*(m.) Partnership realty to be deemed personalty.*

This Court doth declare, that the estates appearing by the Master's report [or the said certificate] to have been purchased on account of the partnership, and out of the funds and effects thereof, did form, and are to be considered as part of, the capital and effects of the partnership, at the time of the decease of the testator, and that the testator's interest in the said estates, and such other real estates, if any, as formed part of the capital and effects of the partnership, at the time of his decease, are to be considered in equity personal estate of the testator. *Phillips v. Phillips*, 1 M. and K. 649. 1 Seton Dec. (Eng. ed. 1862) 555.

*(n.) Inquiry whether dissolution beneficial for infants.*

The defendants, the executors, by their counsel declining to carry on the testator's trade of &c., it is ordered that the Master do inquire, whether it be for the benefit of the plaintiffs (*the infants*) that the terms offered by the defendant S. for dissolving the partnership in the pleadings mentioned should be accepted, or that such partnership should be dissolved on any and what other terms.<sup>1</sup> 1 Seton Dec. (Eng. ed. 1862) 556.

*(o.) Infants declared entitled to profits against survivor, also executor ; inquiry, if for their benefit to take profits or interest.*

This Court doth declare that the plaintiff E. B., and the defendants, the infants, are entitled to an account of the profits made since the death of the testator in the trade carried on in his lifetime by him and the defendant R. B., as partners, and which, since his death, has been carried on by the said defendant R. B. And the Court doth order that it be referred to A. B., one of &c., to take an account of the profits of such trade, and of the value of the stock and effects therein, and of what such stock and effects consisted ; and that the said Master do inquire whether it would be more for the benefit of the plaintiff E. B., and the defendant G. B., to take the testator's share of the said stock in trade, or to accept the sum of \$ —, with interest, as calculated by the report, dated &c. 1 Seton Dec. (Eng. ed. 1862) 556, 557.

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## 22. ACCOUNTS AS TO SHIPS.

*(a.) Decree for account of ship and cargo. Inquiries as to sale between part-owners.*

It is ordered, that it be referred to A. B., one of &c., to take the account and make the inquiries following, that is to say : 1. An account of all dealings and transactions between the plaintiff and defendant relating to the ship B., and the cargo on board the same, and of all sums of money received and paid by the said parties or either of them, on account thereof ; 2. An inquiry, what is become of the said cargo, and by whom, and for what, the same has been sold, and how much has been received by the said parties or either of them, under an agreement or agreements made between them in relation thereto ; 3. An inquiry, whether any and what sale or sales hath or have been at any time or times, and when, made of the said ship, or any or what part or parts thereof, and to and by whom, and for

<sup>1</sup> The Court of Chancery may appoint a person to carry on trade for an infant partner. *Thompson v. Brown*, 4 John. Ch. 619.

what price or prices respectively; 4. An inquiry, whether such sale or sales was or were a real fair sale or sales, or not, and if not, then what was the value of the said ship, and a fair and reasonable price to be given for the purchase thereof at the time of such sale or sales, or of such pretended sale or sales thereof; and what is become of the said ship, and in whose custody or possession the same now is, and ever since hath been. Adjourn &c. 1 Seton Dec. (Eng. ed. 1862) 559.

*(b.) Decree for general account as to a ship.*

The bill was by some part-owners against the managing owner and other part-owners, or their representatives.

It is ordered, that the said Master do take "an account of all dealings and transactions between the plaintiff and the defendants, relating to the ship or vessel called the J——, in the pleadings mentioned, and of all sums which have been received and properly expended by the defendant M. in respect thereof"; any account settled between the parties, or those interested for the time being, not to be disturbed. Adjourn &c. 1 Seton Dec. 559.

*(c.) Accounts of shares and earnings, and proceeds if sold.*

This Court doth order that it be referred to A. B., Esq., one of &c., to take an account of the several shares of ships contained in the assignment, dated &c., and of the earnings and produce of such shares; 2. And if the same or any of them remain in specie in the custody or power of the defendant, the same is to be sold with the approbation &c.; but if the same or any part thereof have been sold, the said Master is to charge the defendant with the earnings thereof at the time of such sale and with the value thereof from the time of such sale; 3. And the said Master is to compute interest on the money arising by such earnings and sale at the rate of &c. 1 Seton Dec. 559, 560.

*(d.) Decree for account of freight and earnings.*

On bill by two of the part-owners against the managing and other part-owners.

This Court doth order that it be referred to A. B., Esq., one of &c., to take the following accounts, that is to say: 1. An account of all sums of money which have arisen from the freight of the ship —— and the profits made by the said ship, or otherwise, on account of the said ship during her voyage to J., and thence back to L., and of the several sums of money received by the defendant D., or by any other person on account of such freight and profits; 2. An account of the several sums of money expended on the outfit of the said ship, and of the expenses incurred during the voy-

age ; 3. An account of the clear profits which have arisen from the said ship since the plaintiffs became part-owners thereof. Adjourn &c. 1 Seton Dec. 560, 561.

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### 23. SURETYSHIP.

*Contribution ; indemnity ; original decree.*

*(a.) Between co-sureties and principal, in suit by surety.*

Plaintiffs' testator and defendant Wright were co-sureties for Watson, on whose default plaintiffs' testator had been compelled to pay ; bill charged that Watson was insolvent, and prayed contribution.

This Court doth order and decree, that it be referred to A. B., Esq., one of &c., to take an account of all sums of money paid by T. W., the testator in the pleadings named, and the plaintiffs, his executors, or either of them, agreeably to the undertaking in the pleadings mentioned, dated &c., and compute interest on such sums of money, at the rate of &c., from the times the several payments were made, and tax the plaintiffs' costs of this suit (cause) ; and it is further ordered, that the defendant G. Wright pay to the plaintiffs one moiety of what shall be found due for principal and interest as aforesaid, together with their costs of this suit (cause) when so taxed (within &c.). And it is further ordered, that the defendant, G. Watson (within &c.) pay to the plaintiffs the other moiety of what shall be found due for principal and interest as aforesaid, and also pay to the defendant, G. Wright, the principal and interest before directed to be paid by him to the plaintiffs, together with the costs of the said defendant, G. Wright, to be taxed &c., and also the costs which he shall pay to the plaintiffs under the direction before given. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 562.

*(b.) Account of payments by plaintiff as surety, and inquiry whether some of the co-sureties can contribute.*

This Court doth order and decree, that it be referred to A. B., Esq., one of &c., to take the account and make the inquiry following, that is to say : 1. An account of all and every sum and sums of money which hath or have been paid by the plaintiff, as one of the sureties of the defendant W. G., as collector of taxes for the town of —, in the county of —, as in the bill mentioned ; 2. An inquiry, whether the defendant J., another of such sureties, is in such pecuniary circumstances that he can contribute towards the payment of the sums, if any, which have been paid by, or may be payable to, the sureties of the said defendant W. G., or either (any) of

them ; but the said inquiry is to be without prejudice to any question between the plaintiff and the defendant J., or between the said defendant, and all or any of his co-defendants ; and the defendants S. and P., not desiring any inquiry whether the defendant F. G. can contribute towards the payment of the said sums, the Court doth not think fit to direct such inquiry. Adjourn &c. 1 Seton Dec. 562, 563.

*Contribution ; indemnity ; further order.*

(c.) *One co-surety unable to pay his full share ; costs of resisting contribution.*

This Court doth order and decree that “ the defendants S. and P., as executors of F. S., one of the co-sureties, with the late plaintiff H., for the defendant W. G., as the collector &c., under the several bonds, dated &c., on or before the — day of —, pay to the plaintiffs T. and W., as executors of the said H., the sum of \$ —, being one fourth part of \$ —, which is the aggregate amount of the sums amounting to \$ —, paid by the said late plaintiff in satisfaction of the said bonds, and for the costs in the &c., mentioned, and of \$ — agreed upon as the amount of the interest on the same at the rate of &c., from the respective times when the several principal sums were paid by the said H. ; and that the defendant Suter, another of such co-sureties, within the time aforesaid, pay to the said plaintiffs T. and W., the sum of \$ —, being one other fourth part of the said sum of \$ — ; and that the defendant J., another of such co-sureties, within the time aforesaid, pay to the plaintiffs T. and W., the sum of \$ —, agreed to be paid by him ; and that the defendants S. and P., within the time aforesaid, pay to the plaintiffs T. and W. the sum of \$ —, agreed to be paid by them in respect of the one fourth share that ought to have been contributed by the defendant J—. Like direction as to the defendant Suter. And the Court doth further order, “ that the defendant W. G., within the time aforesaid, repay to the plaintiffs T. and W. the sum of \$ —, being the difference between the said sum of \$ — and the sum of \$ —, the amount of the several sums so to be paid to them as aforesaid, and also repay to the defendants S., P., Suter, and J., respectively, the several amounts that shall be paid by them to the plaintiffs, under the directions hereinbefore contained ; and the plaintiffs and the last-named defendants not asking any direction for contribution against the defendant F. G., another of such co-sureties, this Court does not think fit to direct such contribution. And this Court doth further order, that the defendants S. and P. and Suter pay to the said plaintiffs T. and W. so much of the costs of these suits (causes) up to this time as have been occasioned by their insisting that they were not liable to contribute anything towards payment of the

said sum of \$ — ; but this Court does not think fit, under the circumstances of this case, to give any other costs on either side." *Hitchman v. Stewart*, (1855,) 3 Drew. 271 ; 1 Seton Dec. 563.

(d.) *Between co-defendants, in suit by creditor.*

By the original decree, G. was to pay what on the account thereby directed should be found due from him to plaintiffs ; in default, W. and wife were to pay it, reserving how far they should stand in plaintiffs' place.

It appearing to the Court that the defendants W. and his wife have paid to the plaintiffs what was reported due to the plaintiffs by the Master's report, dated &c., for their demands and costs of this suit, the Court doth declare that the defendant G. ought to indemnify the said defendants W. and wife, in respect of such payment, and to reimburse them what they have so paid ; and the Court doth order, that the said defendants W. and wife be at liberty to prosecute the said decree against the said defendant G., in the names of the plaintiffs, in order to recover against the said defendant G. what they have so paid to the plaintiffs ; and the defendants W. and wife are to be at liberty to make use of the names of the plaintiffs for that purpose, the said defendants W. and wife indemnifying the plaintiffs against any costs or damages they may be liable to on that account. 1 Seton Dec. 563, 564.

(e.) *Contribution to general average loss.*

U. S. C. C.  
Mass. District. } May Term, 1855.

L. L. S. v. T. G. C.

This cause having been referred to W. P., Esquire, as a special Master in Chancery, to determine and report the amount which was due from the defendants, as owners of the cargo of the barque "Vernon," to the owners thereof, as contribution, on account of the damages and expenses incurred in and by reason of the voluntary stranding of said vessel as alleged in said bill, the said Master having heard the parties, and their proofs, and what was alleged by their counsel, made a report which was duly presented to the Court, and to which the plaintiffs excepted, because the said Master had refused to allow to them a certain commission charged by them for services in attending to the adjustment and collection of the general average contribution ; and the Court having heard the arguments of counsel on said exception, and considered the same, did order and decree that the said exception was well taken, and that the said report be recommitted to the said Master with directions to reform the same by allowing the commission aforesaid ; and said report having been so recommitted and

reformed, the said Master doth find and report, that there is due and owing from the said several defendants to the said plaintiffs the sums of money hereinafter mentioned, to wit: From the said T. G. C. the sum of \$ —; from the said G. H. the sum of \$ —; from the said P. C. the sum of \$ —; from the said O. E. the sum of \$ —; from the said G. and P. the sum of \$ —; and from the several persons doing business under the firm of C. H. M. & Co. the sum of \$ —; and that there is due from the plaintiffs to the said W. A. the sum of \$ —; said sums of money including interest on the sums found to be due by the said Master from the date of the filing of said bill of complaint up to the date of August now current.

And said report being presented, and no exception taken or objection made thereto, it is ordered and decreed, that the same be accepted. And it is further ordered and decreed, that the said plaintiffs do recover from the said several defendants the sums of money from them respectively found to be due as aforesaid, and costs of suit to be taxed by the clerk, and that executions issue therefor in due form of law. [Sturgis v. Cary, 2 Curtis C. C. 382.]

*(f.) Interlocutory decree; declaring purchase of real estate on joint account of plaintiff and defendant, and not on sole account of defendant; right to redeem; bona fide purchaser without notice; plaintiff entitled to one half the money received by defendant on sale of part of the estate; reference to Master to take an account.*

{ Date  
and  
Title.

This cause coming on to be heard upon the original and supplemental suit, before the Honorable Joseph Story, Associate Justice of the Supreme Court of the United States, and the Honorable John Davis, District Judge of the District aforesaid, at this present term, in the presence of the counsel on both sides; whereupon, and upon debate of the matter and hearing the defendants' answers, and the testimony and proofs taken and read in the said cause, and of what was alleged by the counsel on both sides,<sup>1</sup> the Court doth think fit, and doth declare, that there is full proof of the agreement of the said Flagg & Mann, for the purchase of the right and title of the said Luther Richardson, and also for the purchase of the title of the Frye heirs, in the premises on joint account, as in the said bill is mentioned; and that the

<sup>1</sup> This decree was passed before the Rules of Practice for the Courts of Equity of the U. States, of January Term, 1842, were promulgated by the Supreme Court. Rule 26 prescribes a more concise form.

said agreement is now in full force, it never having been abandoned by the voluntary consent of both of the parties ; and doth further declare, that at the time of the said purchase from the said Luther Richardson by the said Flagg & Mann in the bill mentioned, the said Luther was seized and possessed of an Equity of Redemption in the premises, and that the said Walker & Fisher were seized and possessed of the premises in mortgage, and not of an absolute irredeemable estate therein ; and that the said Flagg & Mann became entitled to the equity of redemption of the same, under and in virtue of the purchase from the said Luther Richardson as aforesaid ; and doth further declare, that the purchases subsequently made by the said Mann from Walker & Fisher, and from the Frye heirs, ought to be deemed in Equity as purchases for the joint account of the said Flagg & Mann, as in the said bill is mentioned, and not for the sole account of the said Mann ; and that the said Flagg is, and ought now to be, entitled to the benefit of a moiety of the said purchases, he paying and allowing to the said Mann one moiety of the moneys paid, and costs and charges incurred in the same purchases ; and doth further declare, that, inasmuch as the said Mann was, at the time of the sale of one moiety of the premises to the said Adams, fully and absolutely entitled to the said moiety, in his own right, that the conveyance to the said Adams is, and ought to be, deemed free from any equity of the said Flagg therein ; but that the said Adams is not, under all the circumstances, entitled to any costs. And doth further declare, that the said Fuller is, and ought to be, deemed a *bona fide* purchaser for a valuable consideration, without notice of the Equity of the said Flagg in the other remaining moiety of the premises, and therefore is entitled to hold the same free of any equity claim and lien of the said Flagg therein, except as to so much of the purchase-money as was unpaid when he the said Fuller had full notice of the said Flagg's equity and claim to the premises, as the same equity and claim are affected in the bill ; for all which it is hereby declared, that there is a lien on the premises for the benefit of the said Flagg ; and doth further declare, that the said Mann, in the said sale of the premises to the said Fuller, as is in the bill mentioned, without the knowledge or consent of the said Flagg, was guilty of a wrong and constructive fraud upon the rights and equity of the said Flagg, in the premises, and that, therefore, the said Mann is primarily liable to pay over to the said Flagg one moiety of all the purchase-money, for which the premises were sold, after deducting therefrom one moiety of the several sums paid by him to the said Walker & Fisher, and to the Frye heirs, for the purchase, assignment, and extinguishment of the interest, rights, and title to the premises, and all expenses incident thereto ; together with interest upon the same moiety of the same purchase money, from the time when the same was received ; if the Master shall, under all the circumstances, report any to be due. And the Court doth order and decree, that

it be referred to C. S., Esq., appointed a Master for this purpose, to take an account of all the moneys received and paid, and expended in the premises; and especially to take an account of all the moneys paid by the said Mann, for the purchases aforesaid, and the expenses incident thereto; and also of all the moneys paid by the said Fuller to the said Mann, and the times when the same were paid &c.; and whether, and at what time, he had notice of the said Flagg's equity and right in the premises, and what sums now remain due from the said Fuller. And the Master is also to report upon all other matters and things, which may be necessary and proper to carry into full effect this interlocutory decree, and especially in regard to interest &c., &c. And all further orders and decrees are reserved for the further consideration of the Court. [Flagg v. Mann, 2 Sumner, 486, 565.]

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#### 24. PARTITION AT THE HEARING.

##### *(a.) Decree for partition and commission to issue.*

The Court doth order, that a commission issue, directed to certain commissioners to be therein named, to divide the estate in question into moieties; And that one moiety thereof be allotted as the share of the plaintiffs, and the other moiety thereof as the share of the defendants; and that the plaintiffs and defendants hold and enjoy their respective moieties in severalty, according to such allotments; and that they execute mutual conveyances to each other of such respective moieties, according to their respective interests therein, such conveyances to be settled by the said Master [or the Court, or Judge]. [If no infants or married women interested, add, in case the parties differ about the same]; and it is further ordered that all deeds and writings relating to the said estate, in the custody or power of any of the parties, be produced before the commissioners upon oath, as they shall require; And it is further ordered, that the commissioners be at liberty to examine witnessess upon oath, and take the depositions in writing, and return the same with the commission. Liberty to apply.

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#### 25. SPECIFIC PERFORMANCE.

##### *Reference of Title.*

##### *(a.) Inquiry as to title at the hearing.*

This Court doth order, that it be referred to A. B., one of the Masters in Chancery for the County of &c., to inquire, whether a good title can be made to the estates comprised in (Lot No. 3 in the particulars of sale, and

in) the agreement in the plaintiff's bill mentioned ; And in case it shall appear that a good title can be made to the said estates, it is ordered, that the said Master do further inquire when it was first shown that such good title could be made. Adjourn &c. *Matthews v. Swallow*, 1 Seton Dec. (Eng. ed. 1862) 593.

*(b.) Declaration of right on bill by vendor, and inquiry.*

This Court doth declare, that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution, in case (provided that) a good title can be made to the premises comprised therein ; and decree the same accordingly. Inquiries as to title. [Form (a), *supra*.]

*(c.) Same ; where title accepted subject to requisitions, and subject to compensation.*

This Court doth declare, that the defendant is bound to accept the title of the plaintiff to the estate mentioned in the agreement of the — day of — in the plaintiff's bill mentioned, subject to the requisitions of the said defendant upon the said title, mentioned in the exhibit marked B., and dated &c. ; and the Court doth further declare, that the plaintiff is entitled to a specific performance of the said agreement, subject to the deduction of \$ — from the amount of the purchase-money of \$ —, by way of compensation to the defendant in respect of the house-tax in the defendant's affidavit mentioned, provided that the plaintiff can make a good title to the estate comprised in the said agreement, so far as respects the matter of the said requisitions. Inquiry as to title having regard to the requisitions only. 1 Seton Dec. (Eng. ed. 1862) 593, 594.

*Decree for specific performance.*

*(d.) On bill by vendor to enforce contract for sale.*

This Court doth declare, that the agreement in the plaintiff's bill mentioned, dated &c., ought to be specifically performed and carried into execution ; and decree the same accordingly ; And it is ordered, that it be referred to A. B., one of the Masters &c., to compute interest at the rate \$ — per cent per annum, on the sum of \$ —, the (residue of the) purchase-money for the estate comprised in the said agreement, from the — day of —, when the same ought to have been paid according to the terms of the said agreement. And the said Master is to take an account of the rents and profits of the said estate received by the plaintiffs or any of them, or by any other person &c., since the — day of — ; *If costs are given*, And tax the plaintiffs their costs of this suit (cause) ;

And it is ordered that what shall be coming, on the said account of rents and profits, be deducted from the amount (of the residue) of the said purchase-money, and interest (and costs) when so computed (and taxed) as aforesaid; And upon the plaintiffs' executing a proper conveyance of the said estate to the defendant, (at the expense of the defendant according to the said agreement) or to whom he shall appoint, such conveyance to be settled by the said Master [or the Court] in case the parties differ, it is ordered that the defendant pay to the plaintiffs the balance which shall be found to remain due to them in respect of such purchase-money, and interest (and costs), after such deduction as aforesaid. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 607, 608.

*(e.) Where title accepted at the hearing.*

The defendant R., by his counsel, declaring himself content with the title to the estate, in the pleadings mentioned, agreed to be purchased by him of &c., this Court doth declare, that the agreement in the plaintiff's bill mentioned, dated &c., ought to be specifically performed &c.

*(f.) On bill by purchaser.*

[*Declaration and accounts as in Form (d) above.*] And upon the plaintiff paying to the defendant the balance which shall be found due to him in respect of such purchase-money, (and) interest (and costs), after such deduction as aforesaid, it is ordered that the defendant execute a proper conveyance of the said estate to the plaintiff &c.

*(g.) Purchaser having waived title; indemnity against mortgage.*

This Court doth declare, that, under the circumstances in the plaintiffs' bill mentioned, the defendants have waived their right to investigate the plaintiffs' title to the estate in the pleadings mentioned, and that they have accepted such title; and thereupon it is ordered, adjudged, and decreed that the defendants specifically perform the agreement dated &c., by accepting an assignment of the equity of redemption of the said estate from the plaintiffs, without previous investigation of the title; and it is further ordered &c., that the defendants execute to the plaintiffs a proper deed of indemnity against the mortgage debt secured by the indenture in the bill mentioned, dated &c., and interest thereon, the plaintiffs, by their counsel, undertaking to execute and deliver to the defendants a proper deed of assignment of the said equity of redemption, and otherwise to specifically perform the said agreement on their own parts, so far as the same has not been waived by the defendants; and such deeds of assignment and inden-

nity respectively are to be settled by the said Master [or Judge, or the Court]. Defendants to pay plaintiffs' costs of suit. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 609.

*(h.) Declaration as to waiver of title.*

Let the order dated &c., be varied, and instead of the declaration therein contained, that the defendant has accepted the plaintiff's title to the estate, &c., comprised in the agreement, dated &c., declare that the defendant has waived the right to call for the plaintiff's title to the said estate. *Simpson v. Sadd*, 4 D. M. G., 673.<sup>1</sup>

*(i.) Voluntary settlement set aside in favor of purchaser.*

Decree for performance of agreement for sale, with consequent directions. "And it is declared by the Court, that the plaintiff is a purchaser within the intent and meaning of the act of the 27 El. c. 4, entitled 'An act against covinous and fraudulent conveyances,' and that the indenture of settlement dated &c., in the pleadings mentioned, is void as against the plaintiff; and it is ordered &c., by the Court that the defendants S. and M. (*trustees of the settlement*) convey or concur with the defendant W. (*vendor and settlor*) in conveying and assuring to the plaintiff, or as he shall direct, such parts of the estate comprised in the said agreement for sale as are comprised in the said indenture of settlement, and also deliver up to the plaintiff all deeds and writings in their custody relating to the said estate." Plaintiff to pay the trustees costs of suit; defendant W. to repay plaintiff what he shall so pay, and pay his costs up to the decree. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 610.

*Compensation or abatement.*

*(j.) Inquiry, if part, to which title not shown, material.*

It is ordered, that the Master do inquire whether such part, if any, of the said estate, as to which the plaintiff cannot make a good title, is material to the enjoyment of the remainder, and if not, what deduction ought to be made from the purchase-money in respect thereof.

*(k.) Similar inquiry, without prejudice.*

And in case it shall appear that the plaintiff can make a good title to the said estate, except &c., containing six acres &c., in the pleadings &c., it is

<sup>1</sup> For claims respecting occupation rent, and inquiry as to value of timber and acts of husbandry &c., see 1 Seton Dec. (Eng. ed. 1862) 609.

ordered and decreed, that the Master do inquire whether the said six acres &c. are material to the possession and enjoyment of the rest of the estate, and what compensation ought to be made to the defendant in respect of the said six acres &c., in case it shall appear that the same are not material to the possession and enjoyment of the estate; such last-mentioned inquiry to be without prejudice to the question whether such six acres &c. are material to the possession and enjoyment of the rest of the estate. 1 Seton Dec. (Eng. ed. 1862) 618, 619.

(l.) *Abatement for delay.*

Defendant by his answer admitting the agreement &c., decree for performance and accounts. "And it is ordered and decreed, that the defendant be at liberty to deduct the sum of \$ —, by way of compensation, for delay in delivering possession of the said estate to the defendant."

(m.) *Abatement for deficiency.*

The Court doth declare that the plaintiff is entitled to specific performance &c. "And to an abatement from the residue of the purchase-money and interest, but to the amount only of what would be the worth (value) of the deficiency of the soil mentioned in the pleadings, covered with wood, after deducting the value of the wood thereon, and decree the same accordingly." And that it be referred to G. F. C., one of the Masters &c., to settle such abatement, and to compute the interest on the residue of such purchase-money after the rate of &c., in case the parties differ about the same; and upon the plaintiff's paying unto the defendant what the said Master shall find to be due from him on account of the purchase-money under the said agreement stipulated to be paid, after such abatement as aforesaid, it is ordered that the defendants do convey and assign the premises so contracted to be sold to the plaintiff as he shall direct; such conveyance to be settled by the said Master in case the parties differ about the same. And the Court doth not think fit to give costs on either side. 1 Seton Dec. (Eng. ed. 1862) 619.

*Another form.*

It is declared that the sale and purchase, in the documents and proofs stated and shown, were fair, and that the quantity of land existed, and the title, as declared, existed, and that the description given of the premises was substantially true; and that the fact that the buildings, stated to be on lot 42, being part and parcel of the premises which were sold entire, and for one entire price, do project, in a small degree, on lot 43, being another

part and parcel of the said premises, is not sufficient, nor are any of the circumstances stated in the case sufficient, to set aside the sale, or to exempt the purchaser from being holden to the performance of the contract of sale. But as the circumstance of that projection may diminish the value of the purchase below what would be its value if such projection did not exist, and may entitle the purchaser to compensation by deduction from the price he gave ; it is, thereupon, ordered, that it be referred to G. F. C., Esq., one of the Masters of this Court, to ascertain and report what, in his opinion,<sup>1</sup> under all the circumstances of the case, is the diminution in value (if any) of the premises, as one entire parcel, by means of the projection, below what it would be if no such projection existed, and assuming the value thereof, if the projection did not exist, at \$ 1,400 ; and the question of costs is reserved. [King v. Bardeau, reported, 6 John. Ch. 38.]

*Decree for lease.*

(n.) *On bill by intended lessee.*

The Court declared that the said agreement &c., ought to be carried into execution, according &c., and doth order and decree the same accordingly ; and that a lease be executed by the defendants S. and M., his wife, to the plaintiff of the estate comprised in the agreement for the life of said M. [or for the term therein mentioned] at the yearly rent of &c., and that such claims and agreement be inserted in the said lease as are directed by the memorandum of the said agreement [or with the usual covenants] ; and if the parties differ, it is hereby referred to G. F. C., Esq., one of the Masters &c., to settle the same ; And it is ordered, that the said plaintiff do execute a counterpart of such lease to the said defendants, and that such lease and counterpart be at the equal expense of the said plaintiff and defendants. And it is ordered, that the plaintiff do pay the said defendants their costs of this suit, to be taxed by the said Master. 1 Seton Dec. (Eng. ed. 1862) 620, 621.

(o.) *Decree, with inquiry, if leases tendered for execution are proper.*<sup>1</sup>

Decree performance. "And it is ordered, that the said Master do inquire whether the lease of the messuage &c. in question, executed by the plaintiff and tendered by him to the defendant, is a proper lease ; and if it shall be found that the same is a proper lease, it is ordered that the defendant accept the same, and execute to the plaintiff a counterpart thereof ; but if not, that a proper lease be settled by the said Master [or by the Judge or by the Court].

<sup>1</sup> See form of decree respecting the acceptance of a lease, and the kind of lease a party is bound to accept, in *Rutgers v. Hunter*, 6 John. Ch. 220, 221.

(p.) *Lease antedated, to enable action on covenants; defendant to admit execution or date.*

“And the plaintiff by his counsel consenting, that the lease directed by the said decree, dated &c., to be executed by the defendant to the plaintiff, shall bear date the —— day of ——, and undertaking to admit in any action which may be brought under such lease for the recovery of the possession of the premises (estate), to be demised by such lease, or upon any breach or breaches of any covenant or covenants to be contained in such lease, that the said lease was executed on the day it shall bear date, it is ordered that the said decree dated on the —— day of ——, 1857, (for specific performance,) be affirmed &c.” 1 Seton Dec. (Eng ed. 1862) 622.

(q.) *Direction for lease to contain particular covenant.*

And it is ordered, that such lease shall contain a covenant, on the part of the plaintiff, to pay the taxes, payable in respect of said farm. 1 Seton Dec. 622.

(r.) *Specific performance of an agreement for a family compromise.*

E. L. B. v. J. L. P.

This cause came on to be heard and was argued by counsel, and the Court having considered the same, do find and declare that a concluded agreement was made between the plaintiffs on the one part and the defendant on the other part, as is stated in the said bill, the terms whereof appear in and by the letter of the defendant of the 24th day of April, A. D. 1860, which is set out in the said bill, and that the plaintiffs are entitled to specific performance thereof, and that by force of the said agreement the defendant became charged with the trust of executing the said agreement;<sup>1</sup> and that the defendant being about to leave the United States, without an intention to return, and having actually departed into foreign parts soon after the filing of the bill, and the plaintiffs being remediless by reason thereof save by the said bill, the Court doth retain the same for the purpose of giving the relief to which the plaintiffs are justly entitled. And it is ordered, that the plaintiffs have leave to apply to the Court for such further directions as may be needful to compel the specific performance of the said trust. [Baylies v. Payson, 5 Allen, 473.]

<sup>1</sup> The Court refused to entertain the bill merely to declare the trust, but the defendant being about to leave the country, the trust was declared and the bill retained for further direction. Baylies v. Payson, 5 Allen, 473.

*(s.) Specific performance and reference of title.*

Declare, that the contract of sale between the parties was lawfully executed, and binding upon the defendant by the insertion of his name in the memorandum, which the auctioneers, as his agents for that purpose, did, in writing, immediately after taking down his bid; and I shall further declare, that the defendant did not, and could not, without the consent and agreement of the plaintiffs (and no such consent and agreement appears,) withdraw himself from the obligation of the contract by presenting T. as his substitute, when he did not disclose, either to the plaintiffs or to the auctioneers, at the time of entering into the contract, that he acted as agent for T. And I shall direct the usual reference to a Master, to examine whether a good title can be given by the plaintiffs, for the house and lot sold to the defendant; and that he give to the defendant's solicitor due notice of the examination, and that the evidence taken in chief, in this case, on the point of title, be submitted to the Master, together with such other competent proof as the parties, or either of them, may think proper to furnish; and that he report an abstract of such title, together with his opinion thereon, with all convenient speed. [M'Comb v. Wright, 4 John. Ch. 670.]

*(t.) For specific performance on breach of a bond to reconvey land on certain conditions, after verdict finding a neglect to perform.*

N——, ss.

S. J. C.

October Term, 1857.

O. R. v. C. K. R.

And now, verdict having been returned at the last — Term, that the defendant, C. K. R., did neglect to perform the condition of the bond or agreement bearing date June 15th, 1854, and recorded, and set out in the declaration, as the conditions are specified in the said bond, after argument by the counsel for the plaintiff and for the defendant, and due consideration thereon by the Court;—

It is [declared by the Court] that the covenant of the said C. K. R. in the said bond or agreement to discharge all his right, title, and interest in and to the farm and tracts of land conveyed by the plaintiff to the defendant by said deed dated June 15th, 1854, and to give back a good and sufficient deed of said farm, and lots, and buildings, to the plaintiff, if he, the said C. K. R. should neglect to perform the condition of the bond, ought to be specifically performed and carried into execution, and that the said O. R. is entitled to a specific performance of the said covenant from the defendant, the said C. K. R.; [And the same is ordered and decreed accordingly.]

It is further ordered, adjudged, and decreed, that the defendant, the said C. K. R., do, within 15 days from the entry of this judgment, make, execute, acknowledge, and deliver to the plaintiff a deed of release and quit claim in common form, of all the lands and real estate described in the said deed of the plaintiff to the defendant dated June 15th, 1854, with covenants of warranty against all persons claiming by, through, or under the defendant, the said C. K. R., and that he, the said C. K. R., do deliver up the possession of said lands to the plaintiff, so that the plaintiff may be thereby revested and repossessed of and in the said lands as of his former estate, and that in case of the neglect of the said C. K. R. within said 15 days, to make, execute, acknowledge, and deliver to the plaintiff such deed of release and quitclaim with covenants as aforesaid, or to deliver up the possession of said lands to the plaintiff as aforesaid, and upon affidavit of the plaintiff or his counsel filed with the clerk, that the said C. K. R. has neglected to make, execute, acknowledge, and deliver to the plaintiff such deed of release and quitclaim as aforesaid, or that he has neglected to deliver up the possession of said lands to the plaintiff as aforesaid, that then at any time after the expiration of said 15 days, and within one year from the entry of this judgment, the clerk of this Court do make and issue, and he hereby is required to issue, a writ of *Habere Facias Possessionem*, with a copy of this decree thereto annexed, to the plaintiff, against this defendant, for the said lands described in the said deed, and set out in the pleadings, in order that upon the plaintiff's being restored to the possession of the said lands under and by virtue of the said writ of *Hab. Fac. Poss.*, and due return and registration of said writ and return in the Record of Deeds, the plaintiff may be revested of and in said lands as of his former estate, and as he was seized and possessed thereof before the execution of said deed by him to the plaintiff on the 15th day of June, in the year 1854.

And it is further ordered and decreed, that the plaintiff have and recover his costs of this suit to be taxed, and that the clerk do issue the execution therefor to the plaintiff in common form as usual when one party recovers costs against another in this Court.

By the Court,  
E. S., Clerk.

[Robinson v. Robinson, 9 Gray, 447.]

(u.) *Interlocutory decree.*

*Specific performance ; family compromise ; real estate and stocks.*

F. L. and M. F. L., his wife, v. O. M. F.

And now upon consideration of the pleadings, issue, and verdict of the jury in the case, and after argument of counsel for the plaintiffs and defendant ; —

The Court doth declare, that the articles of agreement made and concluded on the 3d day of July, in the year 1855, between the parties, of which a copy is annexed to the bill and made a part of the pleadings and marked (B), ought to be specifically performed and carried into execution as of the 3d day of July, 1855; and that the plaintiffs are entitled to have the said O. M. F. release and quitclaim to the said M. F. L., to her separate use, all the outlands and all the rest and residue of the real estate formerly belonging to the testator, to wit, &c., which lots are set out in the inventory and made a part of the pleadings; and doth decree the same accordingly.

And whereas it has not been proved or alleged that the railroad shares claimed by the plaintiffs were needed to be sold for the payment of the debts of the testator, it is further declared by the Court, that the plaintiffs are entitled to have the defendant convey to the said M. F. L., to her separate use, two of the shares in the Old Colony and Fall River Railroad Corporation, the six shares in the Boston and Worcester Railroad Corporation, and the two shares in the Concord Railroad Corporation, all which shares were valued in the inventory made a part of the pleadings at \$794, upon the condition that the plaintiffs, the said F. L., and M. F. L., his wife, do, by deed, release to the defendant, for and during the term of her natural life, the improvement of the homestead farm of the said Isaac Fobes, deceased, with all the buildings thereon, with the privilege of cutting wood thereon for fires, and for fences and the repairs of buildings, the income of three thirtieths of the parsonage, the use and income of the pew in the Scotland Meeting House, and the use and income of the River Meadow lot, and upon the further condition that the plaintiffs do, and shall, release absolutely to the defendant, for her own use and disposal, all the personal property on the said farm, also all the notes, claims, and demands due to the said estate of the testator, also the five shares of stock in the Bristol County Bank, and four of the six shares of stock in the Old Colony and Fall River Railroad Corporation owned by the said Isaac Fobes, deceased, and all other the personal estate whatsoever described in said inventory.

And it is further ordered, that unless the parties agree in regard to the matter, and execute conveyances accordingly within sixty days from the 27th day of January, 1859, and within such time the defendant pays to the plaintiffs the dividends paid upon said ten shares of railroad stock since the filing of this bill, to wit, since the 11th day of August, in the year 1856, that then it be referred to Wm. H. W., Esq., as a special Master in Chancery, to take and state an account of the dividends declared and paid since the filing of the bill, and to prepare the conveyance to be executed by the parties in conformity with this decree, and to summon the said parties before him and cause said conveyance to be duly executed by them; the agreement of the parties under this decree, and a copy of the deeds in pur-

suance thereof to be returned into Court; — or if the case goes to the Master, his report of his doings under this decree to be submitted to this Court for approval and confirmation.

By the Court,

Wm. H. W., *Clerk*.

[Leach v. Fobes, 11 Gray, 506.]

(*Final decree.*)

F. L. and M. F. L., his wife, v. O. M. F.

And now the agreement of the parties under the interlocutory decree and an office copy of the deed of the defendant, to the said M. F. L., of the real estate, pursuant to said decree, and a copy of the receipt by the said M. F. L. to the defendant having been returned into Court, by which receipt it is shown that the defendant has transferred to the said M. F. L., to her separate use, the ten shares of railroad stock mentioned in said interlocutory decree and paid to said M. F. L. the dividends on said ten shares as reported by the Master, \$141, and \$28 more accruing between the date of said report and the time of payment in manner and form as required by said interlocutory decree. — It is now ordered, that said conveyance of real estate and said transfer of said ten shares of stocks, and said payment of dividends, in all \$169, be, and the same hereby are, approved and confirmed.

And it is further ordered, adjudged, and decreed, that the plaintiffs have and recover hereby judgment for their costs to be taxed before the clerk in the usual form and manner, and that the clerk do issue an execution therefor to the plaintiffs.

By the Court,

Wm. H. W., *Clerk*.

[Leach v. Fobes, 11 Gray, 506.]

(v.) *Specific performance of agreement for policy of insurance.*

U. S. C. C.,

Mass. District, }

October Term, 1855.

Union M. Ins. Co. v. C. M. M. Ins. Co.

This case was thence continued from term to term until this present term, when, to wit, on the fourteenth day of November, A. D. 1855, the same came on to be heard on the bill and answer and proofs in the case, and was argued by counsel.

And it appearing to the Court that the plaintiffs, through their agent.

made a proposal in writing for insurance, which contained all the necessary terms of a valid contract for a policy, and that the defendants accepted this proposal.

That this acceptance made a legal contract between the parties, which it is the duty of the Court to order to be specifically performed.

That, as it is admitted that the plaintiffs would have a good cause of action at law upon a policy, if issued in pursuance of the contract, there should be decreed to them in this suit what they would be entitled to recover if a policy were issued and that which was agreed to be done were actually done ;

Thereupon it is ordered, adjudged, and decreed, that the said agreement so entered into between the said plaintiffs and the said defendants set forth in the bill of complaint, and proven in this cause, be specifically performed.

It is further ordered, adjudged, and decreed, that the plaintiffs recover of the said defendants the sum of eight thousand seven hundred and two dollars and forty-three cents, as and for their damage in this behalf sustained, a deduction having been first made from the sum agreed to be issued for premium and salvage, and also the sum of two hundred and four dollars twenty-four cents, for their cost in this behalf sustained.

[U. M. L. Co. v. C. M. M. Ins. Co., 2 Curtis C. C. 524.]

*(w.) Against specific performance ; causes stated.*

“It is declared, that from the great inadequacy in value of the lots in the village of N., which the plaintiff contracted to convey to T. E., deceased, for the two farms in the county of O., which the said T. E. contracted to convey to the plaintiff, and also from the habits of intoxication in which the said T. E. had indulged, in the last years of his life, and the mental debility produced thereby, and also from the want of readiness and ability in the plaintiff to convey a good and unincumbered title to the said lots, at the time fixed for the performance of the said contract, or at any time thereafter during the life of the said T. E., the articles of agreement mentioned in the pleadings ought not, in equity and good conscience, to be decreed to be carried into specific execution by the defendants. It is, thereupon, ordered &c. that the bill be dismissed without costs.” [Seymour v. Delancy, Reported in 6 John. Ch. 222.]

## CHAPTER XIX.

## SPECIFIC RELIEF.

## 1. LOST INSTRUMENTS. FURTHER ORDER.

*(a.) In case of lost mortgage deeds.*

Direction to tax defendant's costs of suit, and raise and pay them out of fund in Court. And the Court doth order that "the plaintiff S., at her own expense, execute to the defendant R., her bond to indemnify the said defendant against any demand which may be made upon him, in respect of the mortgage deeds in the pleadings mentioned; such bond to be settled &c., in case the parties differ. And the Court doth further order, that upon the due execution of such bond, such execution to be certified &c., the residue of the said &c. be transferred to the plaintiff S.; and thereupon, that the plaintiff reconvey and reassign the mortgaged premises to the defendant R., or as he shall direct, free and clear &c., such reconveyance &c. to be at the expense of the defendant R." Liberty to apply.

*(b.) Like decrees; with injunction.*

After declaring plaintiff entitled to redeem, and making injunction to stay ejectment perpetual; and the plaintiff having paid the principal money, the defendant to reconvey and deliver all deeds &c., and the defendant to repay interest paid to him without prejudice by the plaintiff, after six months' notice of paying off the mortgage. "And the Court doth order, that the defendants, at their expense, give to the plaintiff a good and effectual indemnity or security in respect of the loss of the several deeds, dated &c., in &c. mentioned, to indemnify the plaintiff, his heirs and assigns, and his and their estate and effects, and the mortgaged premises in the pleadings mentioned, from and against all loss, costs, charges, damages, and expenses, and other consequences, which the plaintiff, his heirs or assigns, or the said premises shall or may incur, sustain, or become liable to, for or by reason of, or on account or in respect of, the said loss of the said deeds in any manner howsoever; and that such indemnity or security be settled &c." Defendant to pay plaintiff's costs of suit and at law. 1 Seton Dec. (Eng. ed. 1862) 630.

(c.) *Indemnity against lost bill of exchange.*

The Court doth declare, that the defendant is bound to indemnify the plaintiffs (bankrupt's assignees) and the separate estate of the said bankrupt against all liability and loss in respect of the bill of exchange for \$—— in the pleadings mentioned; and decree the same accordingly; and doth order that the defendant G. on or before &c., or within one week after service hereof, take up such bill and pay what is due in respect thereof; defendant to pay plaintiff's costs of suit to be taxed. Liberty to apply.

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2. FRAUDULENT DEALINGS.

(a.) *Release set aside for fraud, and not pleadable at law.*

This Court doth declare, that the release dated &c., obtained by the defendant C. from the plaintiff M., was a fraud on her, and ought to be delivered up to be cancelled. And doth order and decree, that the defendant C. (within &c.) deliver up the said release to the plaintiff M.; and, in the mean time, that the said defendant be restrained from pleading or setting up the said release in bar to the action brought by the plaintiffs P. and M., in the names of the plaintiffs M. and S., upon the bond executed to them by the said defendant for the benefit of the plaintiff P.; defendant C. to pay plaintiffs' cost of suit, except so much of such costs as relate to the deposition of &c. Liberty to apply.

(b.) *Purchase completed through fraud and misrepresentation set aside.*

“This Court doth declare, that the plaintiff B. was induced to complete his purchase of the estates &c., in the pleadings mentioned, by the fraudulent misrepresentations of the defendants A. and W.; and the Court doth further declare, that the several agreements entered into by the plaintiff for the purchase of the said estates &c., and carried into effect and completed by him, ought to be rescinded; and the Court doth order and decree that the same be delivered up to be cancelled.” And that it be referred to &c., to take the following accounts, that is to say: 1. An account of interest on the purchase-money paid by the plaintiff to the defendant A., at the rate of &c., from the time of payment; 2. An account of money paid by the plaintiff in respect of auction duty on the sale; 3. An account of the costs, charges, and expenses paid and incurred by the plaintiff in consequence of, and incident to, the purchase; 4. An account of rents and profits received by the plaintiff; and the Court doth further order and decree, that what shall appear to be due on such account of rents and profits be deducted

from the said sum of \$ —, and what shall appear to be due in respect of the interest thereof, and the said auction duty and costs, charges, and expenses ; and that the balance which shall be found to be due to the plaintiff be (within &c.) paid to him by the defendant A. ; and that upon such payment the plaintiff reconvey to the defendant A. the said estates &c. ; and that the deeds of covenant executed by the plaintiff, as in the said bill mentioned, be delivered up to be cancelled. Defendants to pay plaintiff's costs of suit. Liberty to apply. *Berry v. Armistead*, 2 Kee. 229 ; 1 Seton Dec. (Eng. ed. 1862) 645.

(c.) *Transfer of scrip shares set aside for fraud.*

This Court doth declare, that the transfer by the defendant to the plaintiff of the 1,000 scrip shares, formerly the property of the defendant in the P. Ry, in the bill mentioned, was paid in equity as between the plaintiff and the defendant ; and that, notwithstanding such transfer, the defendant continued to be in equity the owner of the said scrip shares, and that he is liable to repay to the plaintiff the sum of \$ 2,100 with interest thereon, and to indemnify the plaintiff against all sales in respect of the said scrip shares, and in respect of any scrip shares in the said P. Ry, which have been substituted for, or registered in respect of, the said scrip shares, and to accept a transfer of such shares from the plaintiff. And the Court doth order and decree, that the defendant M., within one month after service of this order, repay to the plaintiff B. the said sum of \$ 2,100, together with the sum of \$ 208, for interest thereon, at the rate of &c., from the 21st day of Aug., 1853, to this time, and also subsequent interest on the said principal sum to the day of payment ; and the plaintiff, by his counsel, admitting that he has paid no calls in respect of the aforesaid 1,000 scrip shares, in the plaintiff's bill mentioned, it is ordered that it be referred to &c., to inquire and report what calls have been made on account of the said scrip shares, or on account of any shares in the P. Ry, which have been substituted for, or registered in respect of, such shares, and what is due in respect of such calls ; and it is further ordered, that the plaintiff make to the defendant, and the defendant accept from the plaintiff, a transfer of the shares in the P. Ry, which have been substituted for, or registered in respect of, the said 1,000 scrip shares ; and that the defendant do and concur in all acts necessary for that purpose, including the payment by the defendant of all sums which shall appear by the Master's report to be due in respect of such calls as aforesaid, and also such further sums, if any, as shall, before such transfer, become due on account of further calls in respect of the said 1,000 scrip shares, or in respect of any shares which have been substituted for, or registered in respect of, such shares." Defendant to pay plaintiff's costs of suit. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 645, 646.

*(d.) Plaintiff declared not bound by mortgage and judgment obtained from him by fraud by his solicitor, who received and misapplied the money.*

This Court doth declare, that the plaintiff is not bound by the deeds of mortgage and further charge in the bill mentioned, and thereupon doth order and decree, that the same be delivered up to be cancelled; and that satisfaction be entered upon the judgment, in the bill mentioned, obtained by the defendants C. and R., (*mortgagees, innocent parties,*) against the plaintiff; defendants to pay plaintiff's costs of suit. *Wall v. Cockerell*, 1 Seton Dec. (Eng. ed. 1862) 648.

*(e.) Settlement by lunatic, since so found, set aside.*

And it appearing by the evidence aforesaid, that the indenture of settlement, dated &c., made or expressed to be made between F. of the one part and the defendants M. and S. of the other part, was executed by the said F., since deceased, when of unsound mind, the Court doth declare, that the said indenture of settlement of the —— day of ——, is null and void; And it is thereupon ordered and decreed, that the defendants M. and S. deliver up the said indenture of settlement to the plaintiff to be cancelled; Directions to tax, raise, and pay costs of all parties out of fund in Court (*being the settled fund*), and for transfer of the residue to the legal representatives of the lunatic. 1 Seton Dec. (Eng. ed. 1862) 648.

*(f.) Conveyance in contemplation of insolvency set aside as fraudulent.*

This Court doth declare, that the indenture dated &c., in the pleadings mentioned, is fraudulent and void as against the creditors of the insolvent debtor in the pleadings named; And doth order that the defendant deliver up the said indenture to the plaintiffs to be cancelled; And the Court doth order and decree, that it be referred to &c., to take an account of the rents and profits of the estate comprised in the said indenture received by the defendant or by any other person &c.; and that the said defendant, within one month after the date of the Master's report of the result of such account, pay the balance, if any, that shall be found to be due from him to the plaintiffs C. and W., as assignees of the estate of the said insolvent debtor."—Defendant to pay plaintiffs' costs of suit.—"But, in case, on taking the said account, any balance shall appear to be due to the said defendant, it is ordered that the further consideration of this cause and of the subsequent costs, be adjourned &c. *Cazenove v. Pilkington*, 1 Seton Dec. (Eng. ed. 1862) 649.

(g.) *Decree, declaring a party estopped from asserting a legal title after acquiescence in the purchase of the premises by a bona fide purchaser from a third party.*

"It is declared and adjudged, that the defendant encouraged and advised the sale, by E. F., and the purchase, by the plaintiff, L. S., of the six and a half acres of land, in the village of B., devised by the will of R. F. to the said E. F., and in the pleadings and proof mentioned; and recognised and admitted the title derived under the said will, and for the space of nearly, or about, — years subsequent to the death of the said R. F., and with the knowledge of her will, the defendant acquiesced in the acts of ownership of the said E. F., as devisee under the said will, and of the said L. S., as purchaser under the said E. F. And it is further declared and adjudged, that the defendant is in equity *concluded and estopped*, by those acts and admissions, from asserting his legal title, as heir of the said R. F., to the said six and a half acres of land, against the claim or title thereto, on the part of the plaintiffs, derived under the will of the said R. F., and that the declaration by the defendant of his ignorance, during all that time, of the invalidity in law of the will of the said R. F., if well founded in point of fact, is no sufficient defence against the equitable bar to his legal title, arising from the acts and admissions aforesaid; inasmuch as, with knowledge of all the facts, he was bound to inform himself of his own title, before he undertook to advise and encourage the sale and purchase of the same land by others, under an adverse title. It is, thereupon, ordered, adjudged, and decreed, that the defendant, and all persons claiming under him, be perpetually enjoined from prosecuting at law, by action of ejectment, or otherwise, his right, claim, or title, as heir to his daughter, R. F., to the six and a half acres of land aforesaid, as against the plaintiffs or either of them, or as against any other person or persons, claiming or possessing the same, by, from, or under them or either of them, or under any right or title derived from them or either of them; and the injunction heretofore issued in this cause is hereby declared to be perpetual. And it is further ordered, that a copy of this decree be served on the defendant, and on his solicitors, attorneys, and counsel, to the end that due obedience may be rendered thereto. And it is further ordered, adjudged, and decreed, that no costs of this suit be charged by either party as against the other."<sup>1</sup> Decree entered in *Storrs v. Barker*, reported 6 John. Ch. 166.

<sup>1</sup> The form of a decree based upon the same principle, with variations as to the particulars of the order, and a reference to Master to take an account of rents, profits, taxes, repairs, permanent improvements, &c., will be found in *Wendell v. Van Burselaer*, 1 John. Ch. 344.

(h.) *On a bill to rescind a contract for the purchase and sale of timber lands, on account of material misrepresentations; to obtain repayment of the money advanced, and to have the notes given for the balance discharged and cancelled, or compensation made and the plaintiff indemnified.*

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is declared by the Court, that the contract of sale, and the conveyance of the premises, and the notes of the said Daniel thereupon, as set forth in the bill, were made by and between the said Otis Daniel and the said James Todd and other parties, upon material misrepresentations and mutual mistakes as to the quantity of timber on the premises so sold, and therefore ought to be set aside, and held null and void; and the said Otis Daniel ought to be repaid the amount of the said purchase-money, actually paid by him thereupon and therefor, by the said Todd, who received the notes for the same, and in his aid and for his relief, by such of the other parties, defendants to the bill respectively, for whom the said Todd acted as agent, or who with a full knowledge of, and assent to, the said contract of sale and misrepresentations and mistakes, have received any of the said notes, or any part of the purchase-money paid thereon by the said Daniel; but not for the part thereof received by any other party. And thereupon, in furtherance of the declarations aforesaid, it is further ordered, adjudged, and decreed, that the same contract of sale, and conveyance, and notes, be, and hereby are, annulled, rescinded, and declared utterly void, and of no effect.

And the said Otis Daniel is further ordered, adjudged, and decreed, to reconvey the premises by such due and reasonable conveyance or conveyances as shall be devised and reported by a Master, when and so soon as the purchase-money actually paid by him shall be repaid as hereinafter mentioned.

And it is further ordered, adjudged, and decreed, by the Court, that the said James Todd be, and hereby is, held directly liable to the plaintiff for the whole amount of moneys paid as aforesaid, deducting, however, therefrom the proceeds of timber sold, as well as the value of timber taken from said lands, by and under the authority of the said Otis Daniel, and remaining unsold, and making all due allowances for all proper charges and expenses incurred in regard to said timber, and for taxes paid on the said lands.

And it is further ordered, adjudged, and decreed, that such of the other parties, defendants to said bill, as with a full knowledge of the premises, or for whom the said Todd acted as agent, or who assented to the said contract of sale and conveyance, with a full knowledge of the premises, shall be, and hereby are, decreed to be liable in aid and relief of the said Todd, to

pay and deliver back to the said Otis Daniel, such parts or portions of the purchase-money paid by the said Daniel for the said lands, as have been received by them respectively in the premises, or on the notes of the said Daniel so received by them; but no one of them to be liable for any purchase-money or notes received by any of the other parties, defendants.

And it is further ordered, adjudged, and decreed, by the Court, that no damage or interest on the aforesaid moneys be allowed, except the proceeds of such timber, sold and unsold, as aforesaid, shall furnish a fund therefor; and in that event, interest upon said purchase-money to be added thereto, as an offset *pro tanto* to the excess of said proceeds not exceeding the amount of such excess.

And it is further ordered, adjudged, and decreed by the Court, that it be referred to S. L., Esquire, as Master, to ascertain the amount due to the plaintiff on the basis of this decree, and also the particular notes and sums received by each of said defendants of said purchase-money, so paid and secured as aforesaid, and to report the same to the Court.

And it is further ordered, adjudged, and decreed by the Court, that the Master be clothed with full power to examine, as well the parties, as any other witnesses, orally or upon written interrogatories, under oath, in the premises, and to require the production of all vouchers, papers, and other documents pertinent and proper in the premises; and that he state a full account in the premises, upon the basis of this decree. And that he be clothed with all the usual powers and authorities of a Master, in all things touching the premises.

And all further orders and decrees are reserved for the consideration of the Court.

[Daniel v. Mitchell, 1 Story C. C. 196 to 198.]

(i.) *Decree declaring a levy void, enjoining not to set up any title under it, and ordering a release.*<sup>1</sup>

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed by the Court, that the said levy on the land in the said Charlestown, in the pleadings mentioned, being made with full notice of the title of the plaintiff in the bill mentioned, the title thereto is a fraud upon the plaintiff, and therefore is to be held utterly void; and the Court do declare the same accordingly. And it is further ordered, adjudged, and decreed by the Court, that the said defendant, his heirs and assigns, be perpetually enjoined not to set up or assert any title thereto against the said plaintiff,

<sup>1</sup> The *form of decree* in case where execution had been fraudulently issued and sale made under it; — declaring title under sale void and directing accounts, see Troup v. Wood, 4 John. Ch. 260, 261.

his heirs and assigns, under the said levy; and that the said defendant do execute, in due form of law, within thirty days from the entering of this decree, a deed of release of all his right and title under the said levy to the said plaintiff, his heirs and assigns, in such form as shall be settled by T. P., Esquire, one of the Masters in Chancery of this Court, and that the plaintiff recover costs.

[Briggs v. French C. C. U. States, Mass., 2 Sumner, 261.]

*(j.) Decree declaring void the levy of an execution in favor of a judgment creditor of an insolvent debtor upon the debtor's reversion of real estate, after the first publication of notice of issuing the warrant.*

This cause came on to be heard upon the pleadings and the proofs, as reported by the Judge who heard the cause sitting in equity in Boston, on the 23d day of August, in the year 1862, and was argued by counsel; and after due consideration the Court doth declare the levy of the defendant's execution upon a portion of the reversionary interest in said lands, formerly belonging to said L. S., to be null and void, as against the plaintiff, as such assignee of said L. S., an insolvent debtor; and that the complainant, as such assignee, holds in fee the entire one undivided half of said farm and lands described in said deed of J. S., the father, to said L. S. and J. S., Jr., bearing date the fourth day of December, in the year 1848, subject to the life estate of said J. S. therein, upon the trust to sell the same for distribution among the creditors of said L. S., and it is ordered, adjudged, and decreed, that the said W. W., upon the tender to him of a release to the plaintiff of said lands so levied on, do, and he hereby is required to execute, acknowledge, and deliver the same to the plaintiff, under the penalty, in case of a refusal so to do, of what may befall thereon; and that the plaintiff have execution, in common form, forthwith, against said Whiston, for his costs of this suit to be taxed by the Clerk.

E. R. H., J. S. J. C.

Attest Wm. H. W., Clerk.

[Hall v. Whiston, 5 Allen, 126.]

*(k.) Setting aside a fraudulent conveyance, charging the real estate with a judgment debt, although not directly liable to an execution, and not permitting the conveyance to stand as security for advances made on account of it to the grantor, with the meditated intent to defraud.<sup>1</sup>*

This cause came on to be heard at this term, and was argued by counsel, and thereupon upon consideration thereof,

It was ordered, adjudged, and decreed as follows, to wit: that the con-

<sup>1</sup> See Pratt v. Pond, 5 Allen, 59.

veyance made by the said S. S. mentioned in the bill and answers in this cause, bearing date the 15th day of September, A. D. 1809, to the said Esther Steene and Elizabeth Foster, and William Steene and the said William Foster, for two certain farms lying in G. and F., in the county of P., within said district of R. I., containing three hundred and thirty-five acres of land, one called the Wells farm and the other called the Rounds farm, and also the conveyances in the said bill and answers mentioned, made by the said S. S. to the said Z. S., bearing date the 15th day of September, A. D. 1809, for a farm or lot of land, situate in Smithfield, in said district, and known by the name of the Waterman lot, containing fifty-four acres, and also the conveyances in the said bill and answers mentioned, made by the said S. S. to D. S., and to D. S. and the said A. S., bearing date the 15th and 18th days of September, A. D. 1809, for the farm on which the said D. S. then lived, situate in G. aforesaid, called the D. E. farm, lying on both sides of the turnpike road; and also the deed in the said bill and answers mentioned, made by the said S. S. to the said Z. S., bearing date the 18th day of September, A. D. 1809, for a lot of land situate in said G., containing twenty-six acres; and also the deed, in the said bill and answer mentioned, made by the said S. S. to the said Z. S. and S. S., Jr., bearing date the 22d day of November, A. D. 1809, for the farm whereon the said S. S. then lived, situate in the said G., it being all the land he purchased of John Eddy &c., and is about three hundred acres, were made by the said S. S. with the intent to defraud his creditors, and particularly the plaintiff, and are, therefore, as to the plaintiff, utterly void.

But inasmuch as it appears to the Court, that the real estate so as aforesaid conveyed to the said D. S., and to the said D. S. and A. S., have, with the exception of a life estate therein still held by the said A. S., been conveyed to persons who are not parties to the present bill, and the plaintiff seeks no relief against them, it is further ordered, adjudged, and decreed, that the said life estate of said A. S. only be subject to the debt of the plaintiff in this suit, in manner as hereinafter stated, without prejudice to the rights of persons not parties to this bill.

And it is further ordered, adjudged, and decreed, that the said conveyances before mentioned, having originated in a meditated fraud upon the creditors of the said S. S., cannot be permitted to stand as a security for any debts then due to the grantees, or for any subsequent advances by them made in furtherance of the original intention of the parties thereto.

And it is further declared and decreed, that the plaintiff has a right to be paid the principal debt due to him, with interest up to the time of this decree, and that the same ought to be, and is decreed to be, a charge on the same lands, and on the rents and profits (making all proper allowances) which have accrued to the respective respondents, or might have accrued to them without wilful default, since the estates contained in the same convey-

ances have come to their hands, possession, and use ; and it is declared and decreed, that the said lands, rents, and profits, are specifically holden for, and charged with, the payment of the plaintiff's said debt.

And it is further declared and decreed, that the defendants be permitted to pay in the proportion of the value of the estates respectively conveyed to them, to be ascertained by a Master, the amount due to the plaintiff for principal and interest, with costs, if they shall elect so to do, within sixty days from the date of this decree, and in that event the plaintiff is to assign to them, by conveyances to be approved by a Master, all his right and title to the judgments stated in his bill, and to the debts due, and his right and title under this decree ; and the defendants shall be admitted to hold the same accordingly as a charge on the same lands ; but if the defendants shall not pay the said debt and costs within the period aforesaid, then the same Master is to ascertain the rents and profits of the said estates as aforesaid, which are to be paid by the defendants respectively towards the discharge of the plaintiff's debt, and if this fund shall not be sufficient, or shall not be productive, then it is further declared and decreed, that the Master shall sell the lands so conveyed to the defendants by the conveyances aforesaid, or a sufficiency thereof to pay the plaintiff's debt, interest, and cost, at public auction to the highest bidder, in manner as shall hereafter be decreed by the Court, and make due and legal conveyances thereof to the purchaser or purchasers thereof and the defendants S. S., Z. S., A. S., S. S., Jr., E. S., W. F., and E. F. shall respectively join in such conveyance or conveyances, releasing their right, title, and interest therein and thereto, and covenanting against their own acts, in such manner as the Master shall approve, and the proceeds of such sale shall be brought into this Court to discharge the plaintiff's debt and costs of suit.

And it is further declared and decreed, that it be further referred to the same Master, to ascertain by an examination of the plaintiff on oath or otherwise, what was the value at which the plaintiff received the Farmers' Exchange bills for which the drafts, on which his judgments were founded, were given, at the time when he received or bought the same, and that the plaintiff is to be allowed that sum, the damages on said drafts at the rate allowed by law, on the bills of the like nature, and his costs of suit, in the State Courts of R. L., as his principal debt, and the interest is to be computed thereon as aforesaid, and the same Master is to make his report as soon as may be, and in the mean time all further proceedings and orders are reserved for the consideration of the Court.

[Bean v. Smith, 2 Mason, 299 - 303.]

*(L) Assignment, made with intent to defeat heir, of a judgment declared void. Sale ordered of the estate still in hands of the assignees; they to unite in the conveyance. If proceeds insufficient to satisfy judgment &c., assignees to be charged with value of the estate sold by them; just allowances of expenditures &c. prior to judgment. Reference to Master &c.*

This case came on to be heard, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered and decreed :

1. That the assignment made by S. L. to M. B. and W. L., under date of the 13th of May, 1842, and which is set forth in the pleadings, be declared fraudulent and void. 2. That the real estate and all other property conveyed by the above assignment from the said S. L. to the said assignees, and unsold by them, be sold by and under the direction of the receiver heretofore appointed in this cause, he giving such notice of the time and place of sale as is required on sales by a Master of this Court, the defendants to unite in the conveyances of the real estate and in the acknowledgments of the deeds. 3. That the proceeds of the sales, and other funds that may be in the hands of the receiver, be paid over to the plaintiffs, in satisfaction of their judgment set forth in the pleadings, with interest and costs of this suit to be taxed. 4. If the said moneys shall be insufficient to satisfy the judgment and costs, then that the assignees be charged jointly with the value of the assigned property, real and personal, sold or disposed of by them, and with the rents and income thereof, which they received or might have received with ordinary care and diligence, after the date of the assignment, and before the property came into the possession of the receiver; the assignees to be allowed all payments of principal and interest on incumbrances upon the property, existing prior to the judgment, all sums paid for taxes, assessments, needful repairs, insurance against fire, and other charges and expenses in the proper care and management of the property, but no commissions or costs of this suit to be allowed. 5. A reference to J. W. N., one of the Masters of this Court, to take an account upon the principles of this decree, before whom all the defendants shall appear upon summons served upon them, and produce all deeds, papers, books, and documents, and be examined on oath, on application of the plaintiffs, touching any of the matters embraced in the reference; the Master to approve the form of the conveyances to be executed; the plaintiffs to be allowed their taxed costs of this suit out of the funds; and if the same shall be insufficient to pay the judgment and interest, such costs to be paid by the assignees; and execution to issue, on confirmation of the Master's report for the balance, if any, which the Master shall report to be due on such accounting, and for the costs of the plaintiffs; the receiver to pass his ac-

counts before the Master, who is to report a proper allowance for him, to be by him retained out of the funds in his hands.

(m.) *Decree in favor of heirs, declaring void a deed obtained of their ancestor by imposition, he being weak in mind and body, except as to actual advances and charges, for which allowed to stand as security.*

This cause came on to be heard by consent of counsel, at the last term of this Court, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the Court as follows, viz.: that the deeds of conveyance dated the ninth day of May, 1805, and executed by C. W. to A. H., in the pleadings mentioned, ought not to be permitted to stand as absolute and *bona fide* conveyances to the said A. H., the same having been obtained from the said C. W. by the said A. H., by imposition upon him, he being at the time of the execution thereof in a state of great mental and bodily weakness, as well from the visitation of providence as from his extreme old age. And it is further ordered, decreed, and declared by the Court, that, under all the circumstances of the case, the same deeds of conveyances ought to be permitted to stand as security<sup>1</sup> for any advances made, and charges incurred, and allowances due, to the said A. H., by reason of the premises stated in the pleadings, but no further; and as to all other purposes the same are to be held and decreed to be utterly void; and the same is hereby ordered and decreed accordingly.

And it is further ordered and decreed by the Court, that it be referred to A. B., Esquire, a Master for this purpose, to take an account of all debts, claims, and dues between the said A. H. and the said C. W., during his lifetime; and in taking such account, the said Master is to charge the said A. H. with all the personal estate received by him from the said C. W., including that conveyed by deed of gift to his wife, as in the pleadings mentioned, and also with all the rents and profits of said real estates; and the said A. H. is to be allowed credits for all advances made, and charges incurred, and allowances due, for labor and services to and for the said C. W. during his lifetime; and also credit for all repairs and improvements

<sup>1</sup> Where possession had been taken of land, and improvements made, under an agreement which was not sufficient to take the case out of the statute of frauds, though the Court would not grant relief, on the ground of part performance, yet the bill was retained for the purpose of affording the party a reasonable *compensation* for beneficial and lasting improvements. *Parkhurst v. Van Cortlandt*, 1 John. Ch. 273. See the decree in that case. For *form of decree* where bond and mortgage had been obtained by oppression for a much larger sum than was due, ordering them to stand for security for amount due, and a re-transfer on payment of that amount. See *Neilson v. M'Donald*, 6 John. Ch. 201, 212.

made by the said A. H., in and about the same real estates. And the said Master is also to take in like manner an account of all the rents and profits of the same real estates since the death of the said C. W., and is in like manner to be allowed credit for all repairs and improvements on the same estates during the same period. And the said Master is to give notice of his meetings, for the purpose of taking into consideration the premises, to all the parties in interest.

And all further orders and directions are reserved until the coming in of the Master's report.

[Harding v. Wheaton, 2 Mason, 390 – 392.]

*(n.) Decree setting aside a sale of a testator's share in a partnership trade, &c., by his executors, to his partners, for the purpose of being resold to one of his executors, and ordering an account of the subsequent profits, as if the partnership had continued, in favor of the estate.*

This cause came on this day [or this term] to be heard, and was argued by counsel for the plaintiff and for the defendant; and thereupon, upon consideration thereof, this Court doth declare, that the sale of the said testator's interest in the copartnership concern in the pleadings mentioned is void. And this Court doth also declare that the interest of the executors of the said testator W. C. in the said copartnership concern is not yet terminated. And this Court doth order that it be referred to A. B., Esquire, one of the Masters of this Court, to inquire what is the most beneficial mode for all parties of disposing of the partnership property and effects. And the said Master is to state the same, with his opinion thereon, to the Court, and is to make a separate report thereof, with liberty to state such special circumstances as to him shall appear material, and thereupon such further order shall be made as shall be just. And it is ordered, that the said Master do take an account of the profits of the said trade, from the last settlement of accounts which the said Master shall find to have been made by the said testator, or his executors, since his death. And it is ordered that the said Master do take an account of all such sums of money as have been taken out of the said trade, and all such sums of money as have been paid to the executors of the said W. C. for or in respect of the said testator's interest in the said partnership business and property, by any of the parties, and state when and by whom the same have been taken out. And it is ordered that the said Master do take an account of all sum or sums of money which shall have been advanced or paid to the executors of the said W. C. for or in respect of the alleged purchase of the said testator's interest in the said trade in the pleadings mentioned, and calculate interest at the rate of — per cent per annum upon such sum or sums as he shall find to have been so advanced and paid. And this Court

doth reserve the consideration of the allowance of such interest until the account of the profits shall have been taken. And for the better taking of the said accounts, and discovery of the matters aforesaid, the parties are to be examined &c., and to produce &c., as the said Master shall direct, who in taking the said accounts is to make unto the parties all just allowances, and as to such of the said allowances as are claimed and objected to before the said Master, he is to state his reasons on allowing or disallowing the same. Further directions and costs reserved, and liberty to apply.<sup>1</sup>

[Cook v. Collingridge, Jacob, 607.]

(o.) *Decree, declaring void a direction, in a devise of an estate for charitable purposes, that the rents should not be raised, and declaring that there was no resulting trust for the heir-at-law as to the increased rents, &c.*

This Court doth declare, that the directions contained in the will of M. R., the testatrix, in the pleadings named, and the rules thereto annexed, which require that the rents of her estates therein mentioned should continue the same as at the time of her decease, and that no attempts should be made to raise the same, are void, and that the defendant, C. S., the heir-at-law of the said testatrix, hath no right or interest to or in the said real estates, or the rents and profits thereof, or any part of such rents and profits, by way of resulting trust or otherwise. And the Court doth declare that the surplusage of the rents and profits &c. And it is ordered that the information and bill as to the said C. S. be dismissed, with costs to be paid as after mentioned. And the Court doth not think proper to give any directions touching the application of any part of such surplus rents and profits, and forfeitures &c., or to proceed further than to make such declarations of the rights of the parties as herein are contained, and such order as to costs as hereinafter given; and, subject to such declarations as are hereinbefore contained, and to such directions as to costs as are hereinafter given, the Court doth order that such information and bill be dismissed. And it is ordered that it be referred to A. B., Esq., one of &c., to tax all parties their costs of this suit, as between solicitor and client, and also to tax in like manner the costs of the said relators and plaintiffs, and of the said defendants the said Master and Fellows, of a certain petition touching the matters in question in this suit, presented in the year 1813, to the right honorable, the Lord High Chancellor of Great Britain, therein styled visitor of the said college or hall in right of his Majesty, and of all proceedings under the said petition. And it is ordered that such several costs, when taxed, be paid by the defendants the said Master and fellows, out of

<sup>1</sup> See the decrees entered in *Brown v. DeTastet*, Jacob, 284.

any stocks or funds in their possession which have arisen from the rents and profits of the estate of the said testatrix. [Att'y-General v. The Master and Fellows of Catherine Hall, Cambridge, Jacob, 381.]

3. DECREE FOR SALE AND REIMBURSEMENT TO CHILDREN OUT OF THE PROCEEDS OF AN ESTATE, THE INCOME OF THE RESIDUE OF WHICH, AFTER PAYMENT OF DEBTS AND LEGACIES, HAD BEEN GIVEN TO THEM BY THE WILL OF THE TESTATOR, BUT WHICH INCOME, WITH THEIR CONSENT, HAD BEEN TAKEN TO PAY OFF THE SAID DEBTS AND LEGACIES, WHICH WERE DIRECTED BY THE TESTATOR TO BE PAID BY THE SALE OF CERTAIN OF HIS REAL ESTATE.

This cause came on to be heard upon report, and was argued by counsel, and, having been duly considered, the Court doth declare, that the plaintiffs, as equitable tenants for life under the will of the testator, F. A., are entitled to the entire income of the residue of the estates held by the defendant as trustee, subject to the deduction of all sums of money, legally paid or due as and for interest of debts and legacies, cost of repairs, taxes, and other expenses, and to a charge upon the said estates for so much of the said income as had been applied to the payment of the principal of the said debts and legacies, and to have so much of the said trust estates as may be necessary sold and applied to their reimbursement; and it appearing that the said defendant, in his capacity as trustee, has heretofore been authorized by this Court to sell, and has sold, a part of the said trust estates, and now holds the proceeds thereof, it is ordered and decreed that he shall apply so much thereof as may be necessary to their reimbursement and the payment of all and singular any debts and legacies now remaining unpaid, and that if such proceeds should not be sufficient to make such payment in full, the defendant in his capacity as trustee shall sell at public or private sale such of the lands and tenements held by him as he may deem expedient, and apply the proceeds thereof, or so much as may be necessary, to such payment; and it is further ordered and decreed, that before proceeding to make any such sale or sales, the said defendant, trustee as aforesaid, shall give bond in such sum and with such sureties as shall be approved by one of the justices of this Court, that he will faithfully conduct the same and account for the proceeds; and it is further ordered and decreed that the costs of this suit and fees of counsel, as between solicitor and client on both sides, are a charge upon the proceeds of sales now in the hands of the defendant, or hereafter to be received, and are to be paid from out thereof, and either party is at liberty to apply for further directions and for the appointment of a Master to take the said account, if the parties do not agree thereon. [Amory v. Lowell, 1 Allen, 508.]

**4. DECREE DECLARING THE VALIDITY OF A DEED TO TRANSFER THE ESTATE NAMED IN IT, AND ORDERING THAT THE GRANTEE BE LET INTO POSSESSION OF THE PREMISES, AND THAT THEY BE ALLOWED TO HAVE AND ENJOY THE RENTS, PROFITS, AND INCOME THEREOF.**

That the deed of conveyance from the defendants J. A. and E. A., his then wife, to the defendants D. W. C. and R. D. A., bearing date the 25th November, 1805, mentioned and set forth in the pleadings and proofs in this cause, was duly executed and delivered by J. A. and E. A., his then wife, on the 25th of December, 1805, so as to pass the estate and interest in the messuage and premises therein described, to the defendants, D. W. C. and R. D. A., and to vest the same in them, to the uses, and upon the trusts, therein mentioned; and the deed of conveyance is hereby declared valid and effectual in the law, accordingly. And it is further ordered, adjudged, and decreed, that the plaintiffs, S. M. S. and E. B. S., his wife, in her right, be forthwith let into possession of the premises mentioned and described in the deed of conveyance from the defendants J. A., and E. A., his then wife, to the defendants D. W. C. and R. D. A., bearing date the 25th November, 1805, and into the perception of the rents and profits thereof, in arrear and unpaid, and hereafter to accrue and become payable, or that D. W. C. and R. D. A. be immediately let into possession thereof, as trustees, upon the trusts, and to the uses, in the deed expressed and declared, of and concerning the same. And in case D. W. C. and R. D. A., or the survivor of them, shall take possession of the premises, they, or the survivor of them, shall receive and take the rents and profits thereof, in arrear and unpaid, and which shall hereafter accrue, and become payable, in trust for, and pay over the same from time to time, to S. M. S. and E. B. S., his wife, in her right, during their joint lives, to E. B. S., during her life, if she shall survive S. M. S., her husband; or they, D. W. C. and R. D. A., and the survivor of them, shall permit S. M. S. and E. B. S., his wife, in her right, to take the rents and profits during their joint lives; and that E. B. S. is to take the same, during her life, if she shall survive her husband, and after the death of E. B. S., one of the plaintiffs, the rents and profits of the premises shall be received, paid, and applied, according to the uses and trusts in the before-mentioned deed of conveyance, bearing date the 25th of November, 1805, limited and declared. And that the trustees, or the survivor of them, and any other person then claiming an interest therein, under the deed of conveyance, shall be at liberty to apply to this Court for its direction in that behalf. And it is further ordered, adjudged, and decreed, that the defendants, D. W. C. and R. D. A., shall, within twenty days after notice of this decree, cause the deed of conveyance to be acknowledged, or proved, and recorded according to law, for the

greater safety of the title of the plaintiffs in this cause to the premises therein contained, and all others who may become interested therein. And it is further ordered, adjudged, and decreed, that the plaintiffs during their joint lives, and E. B. S., after the death of S. M. S., her husband, if she shall survive him, shall be at liberty to use the names of the trustees, or the survivor of them, and to have the use of the deed of conveyance for the purpose of prosecuting at law, or taking any reasonable measures, to obtain the possession of the premises, and for receiving the rents and profits thereof, according to their and her rights to the same, as hereinbefore declared and adjudged. And it is further ordered, adjudged, and decreed, that the defendant J. A. account with the plaintiffs in this cause, for the rents and profits of the premises, from the 23d day of January, 1809, and that it be referred to one of the Masters in chancery to take the account accordingly; and that in taking the account, the Master charge J. A. with the rents of the premises received, or which, without wilful default, might have been received for the same; and that the Master make all just allowances to J. A. for taxes and repairs; and that the Master shall take the account, and report thereon to the Court, with all convenient speed. And it is further ordered, that the question of costs, and all further directions be reserved until the report shall come in. [Souverbye v. Arden, 1 John Ch. 258 - 260.]

5. DECREE ANNULING PROCEEDINGS UNDER ONE PETITION IN INSOLVENCY, AND DIRECTING A WARRANT TO BE ISSUED ON ANOTHER.

E——, ss.  
S. J. C. }

G. T. L. et al.

v.

G. F. C. et al.

This cause came on to be heard upon the pleadings and proofs in the cause, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the Court,

That the warrant issued by the Hon. G. F. C., Judge of Probate and Insolvency in and for said county of E., on the petition of B. P. W. described in the petition in this cause and all the subsequent proceedings on said petition of said B. P. W. and all proceedings on said warrant be and the same are hereby vacated, annulled, and made of no effect, and the injunctions issued in this cause are hereby made perpetual, and said petition of said B. P. W. is hereby dismissed.

It is further ordered, adjudged, and decreed, that the order or decree

said Judge dismissing the petition of G. T. L., described in the petition in this cause, in which petition so dismissed said G. T. L. represented said B. P. W. and himself, said G. T. L. and W. R. W., to be general partners under the firm of W. & L., and prayed that a warrant in insolvency might be issued for taking possession of their estate, and that such further proceedings might be had in the premises as the law in such cases prescribed, be, and the same is, hereby reversed and annulled, and said Judge is hereby commanded and directed to issue forthwith upon said petition of said Lancaster, and in pursuance of the prayer thereof, a warrant in insolvency in due form under the hand of said Judge and the seal of his Court against said W. L. and W. as general partners, composing the firm of W. & L., as insolvent debtors, and against their joint and separate estates, and to do all such other acts and direct all such further proceedings in the case as the insolvent laws in such cases prescribe.

And it is further ordered and decreed, that an attested copy of this decree be transmitted to the said Judge for his government and direction.

And it is further ordered, that this case be reserved for the further consideration and decree of this Court, upon the question of costs to be allowed to the petitioners.

[Lancaster v. Choate, 5 Allen, 530.]

By the Court.

Attest, A. H.

By B. and B.,  
*their Attorneys.*

At Chambers in B., May 30th, 1863.

It is now ordered, as part of the final decree in the above-entitled cause, that there be allowed the sum of seven hundred and four dollars and seventy-five cents (\$704.75) as costs in these proceedings, to be paid out of the joint estate of said W. & L. by the assignees, who may be hereafter chosen, to the counsel of the petitioning creditors.

## CHAPTER XX.

## PARTICULAR PERSONS.

## 1. FEMES COVERT.

*(a.) Sale of stock and payment to wife's separate use.*

It is ordered and decreed, that the \$—— (*stock*) standing &c., in trust in this cause (the account of &c.), be sold, and that the money to arise by such sale, and \$—— cash in the ——, to the credit of this cause (the like account &c.), and any interest &c., be paid to B., the wife of N., for her separate use.

*(b.) Payment to divorced woman.*

The Court doth order that the money to arise by the sale of the said —— be paid to the petitioner K. (*maiden name*), formerly the wife of B., but now unmarried, having been judicially divorced, on her sole receipt.

*(c.) Inquiry, whether any settlement, and if proper, and if not, direction for settlement.*

The Court doth order that it be referred to &c., to inquire whether (the plaintiff *or* defendant) A. has made any and what settlement or provision for (the plaintiff *or* defendant) B., his wife, and the issue of their marriage, or entered into any, and what agreement for that purpose; and if so, whether the same is a fit and proper settlement or provision for the said (plaintiff *or* defendant) B., and such issue; And if it shall appear that the said (plaintiff *or* defendant) has not made any such settlement or provision, or that such settlement or provision, if any, is not fit and proper, the Court doth order that a proper settlement, to be made by the said (plaintiff *or* defendant) A., on &c., be approved by the &c. 2 Seton Dec. (Eng. ed 1862) 665.

*(d.) Share settled by order, without deed — husband bankrupt.<sup>1</sup>*

The Court doth order that the residue of the said \$—— &c. be carried over in trust in this cause, "The account of the settlement of the defendant C., the wife of W., and her children"; and the Court doth declare that the &c. so to be carried over are to be held in trust for the said defendant C. for her life, and during her present coverture, for her separate use, with

<sup>1</sup> For *form of a decree* ordering a maintenance for a wife out of her property, when she was abandoned by her husband, or prevented by his ill treatment from cohabiting with him, see *Dumond v. Magee*, 4 John. Ch. 318, 325 – 328.

out power of anticipation, and after her decease in trust for all the children of her present marriage who shall attain the age of twenty-one years, or being daughters shall (attain that age or) marry under that age, equally, and if there shall be no such child, and the defendant C. shall survive the said W., her present husband, in trust for her, her executors, administrators, and assigns; but if she shall die in the lifetime of her said husband, without any child, in trust for the defendants P. and D., as the assignees of his estate and effects; and the Court doth order that the interest during the life of the said defendant C., from time to time to accrue due on &c., so to be carried over be, as the same accrue due, paid to the said defendant C., the wife of the said W., for her separate use, or until further order. 1 Seton Dec. (Eng. ed. 1862) 665, 666, and notes.

(e.) *Decree ordering a trustee under a marriage settlement, of a married woman, who was insane, and whose husband was her guardian, to contribute from the trust property secured to her sole and separate use towards the expense of her support, on bill by the husband.*

The cause having come before the full Court for a final hearing upon the bill, answers and facts agreed, and the parties, by their respective counsel, having been fully heard, it is ordered and decreed that the said H. D., trustee of the said J. E. D., pay to the said W. W. D., guardian of the said J. E. D., the sum of four hundred dollars, the same to be paid in thirty days after the filing of this decree; and that he afterwards pay to the said W. W. D. the sum of four hundred dollars annually from the time of filing this decree, till the further order of the Court; the same to be paid in equal half-yearly instalments; the said sums to be paid out of the income of the trust property in the hands of the said H. D.

It is further ordered and decreed, that the costs of this suit, and the reasonable charges of counsel, to be approved and allowed by the Court, be paid by said H. D. out of said income.

In default of payment by said H. D. of said sum of four hundred dollars, and the costs and expenses hereinbefore mentioned, according to the terms of this decree, within thirty days as aforesaid, it is ordered that an execution issue for the same in due form of law.

It is further ordered and decreed, that the said W. W. D. apply the several sums as aforesaid, except the said costs and charges, to the support and maintenance of the said J. E. D., so that, in addition to what shall be furnished for her by him out of his private property, she may be supplied with everything that ought reasonably to be provided for her comfort and convenience.

By the Court.

Boston, Jan. 16, 1863.

(Signed)

G. C. W., Clerk.

[Davenport v. Davenport, 5 Allen, 464.]

*(f.) Assignment of dower ; commissioners ; inquiries.*

**Ellick Powell and wife v. the Monson & Brimfield Manuf. Co.**

This cause came on to be heard at the &c., on the bill and answer, and was argued by counsel. Whereupon it is ordered, adjudged, and decreed, that the said Ellick and Elizabeth, in her right, have as her dower, of the endowment of R. M., her late husband, now deceased, one just third part of the lands, tenements, and hereditaments hereinafter mentioned, exclusive of the increased value of the same, arising from or caused by the buildings erected, and improvements made upon said lands and tenements, &c., or any one of them, since the alienation thereof by the said M., viz of one certain tract of land &c., &c.

And it is further ordered and decreed, that the said Ellick and Elizabeth have and recover their reasonable damages by reason of the detention of her dower in the premises, from and after the 3d day of March, A. D. 1823, when they demanded of the defendants that they should assign and set out to the said Elizabeth her said dower in said lands, tenements, and hereditaments, until the present time. And that the plaintiffs recover of the defendants their legal costs of this suit, to be taxed by the Court. And it is further ordered and decreed, that this bill be dismissed as to all the other lands and tenements mentioned in said bill, and the said Ellick and Elizabeth's claim, in her right of dower in the same, or any, or either of them.

And it is further ordered and decreed, that commissioners be appointed to inquire, ascertain, act, and report, as soon as may be, on the matters following, viz. :

1. The several and respective times when the said R. M. alienated the above described lands, tenements, and hereditaments, and any parcels or undivided parts thereof.

2. The present value of said lands &c., exclusive of the increased value occasioned by the buildings and improvements on the premises, since the alienation thereof by the said R. M. ; and also the reasonable damages by reason of the detention of her dower in the premises from and after the third day of March, A. D. 1823, to the present time.

3. If the commissioners shall find that one third part of said lands &c. can be assigned and set off to said Elizabeth, by metes and bounds, without great prejudice to the same, then, that they proceed to assign and set off to the said Elizabeth one just third part of said lands &c., exclusive of the increased value thereof, occasioned by the buildings erected, and improvements made thereon since the alienation thereof by said R. M., meaning so much and such part of said lands &c., as would be equal in value to one just third part thereof at the present time, in case no buildings had

been erected or improvements made thereon, since the alienation thereof by the said R. M.

4. If the commissioners shall find that one third part of said lands &c., cannot be assigned and set off to said Elizabeth, as aforesaid, to hold in severalty by metes and bounds, without inconvenience and prejudice to the same, then, that they inquire and ascertain, and report to the Court, the yearly amount and value of the rents, profits, and income of said lands &c., exclusive of the increased value arising from, and occasioned by, the buildings erected, and improvements made thereon, since the alienation thereof by said R. M., meaning the true yearly amount and value of the rents, profits, and income, which the said lands &c., would now yield, in case no buildings had been erected or improvements made thereon since the alienation thereof by the said R. M.

[Powell et ux. v. Monson & Brimfield Manuf. Co. 3 Mason C. C. 347.]

*[Second decree in the above case.]*

This cause coming on again to be considered upon the report made by the commissioners appointed to assign dower in the premises, two exceptions were taken in behalf of the respondents to said report, viz.: 1. That the commissioners erred in not considering "the mortgage to R. F., of October 21, 1808, in the pleadings mentioned as an alienation by the said R. M., so as to affect the right of his wife to dower." 2. That the commissioners erred in considering "the water-wheel and the main gearing of the factory as real estate." The exceptions were thereupon argued by counsel for both parties. On consideration thereof, and of the premises, it is ordered, adjudged, and decreed by the Court, that the said exceptions be, and they hereby are, overruled; and that the same report do, in these respects, stand confirmed. And further, that the dower therein assigned to the plaintiffs by the commissioners, firstly in their report, upon the ground that they were right in their opinion on the points above excepted to, be, and hereby is, confirmed and assigned to the plaintiffs accordingly; and that the same report do, in all other respects, stand confirmed. And it is further ordered, adjudged, and decreed, that the defendants do deliver possession of the premises so assigned to the plaintiffs accordingly, and do, in all other respects, perform this decree; that the plaintiffs do recover their reasonable costs in the premises, taxed at \$345.75. 8 Mason C. C. 468, 469.

For forms of decrees respecting the liability of the wife's separate estate for her debts by note, and as surety, see 2 Seton Dec. (Eng. ed. 1862) 678, 679.

(g.) *Alimony on a decree of divorce from bed and board; other directions, custody of child.*

"It appearing, from the pleadings and proofs, that the defendant has been guilty of cruel and inhuman treatment of the plaintiff, by repeated acts of personal violence, so as to render it unsafe and improper, under existing circumstances, for her to cohabit with him, or to be under his dominion and control, it is thereupon ordered &c., that the plaintiff and defendant be separated from bed and board forever, provided, however, that the parties may, at any time hereafter, by their joint and mutual, free and voluntary act, apply to the Court for leave to be discharged from this decretal order. And it is hereby declared to be the duty of each of them to live chastely during their separation, and that it will be criminal, and an act void in law, for either of them, during the life of the other, to contract matrimony with any other person. And it is further ordered &c., that the plaintiff, according to the prayer of her bill, shall be entitled to, and be charged with, the custody, care, and education of the infant son of the parties in the pleadings mentioned, provided always, that this order for the custody, care, and education of the said infant may, at any time hereafter, be modified, varied, or annulled, upon sufficient cause shown. And it is further ordered &c., that the defendant pay to the plaintiff \$200 a year, to be computed from the date of this decree, in half-yearly payments, to be applied towards the support and maintenance of the plaintiff and her son, and that this allowance is to continue until further order, and be subject to variation, as future circumstances may require. And it is further ordered, that the defendant pay to the plaintiff the costs of this suit, to be taxed, and that she have execution thereupon, according to the course and practice of the Court."<sup>1</sup>

[*Barrere v. Barrere*, 4 John. Ch. 187.]

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2. INFANTS.

*Showing cause against decree.*

(a.) *Decree nisi against infant.*

And this decree is to be binding on the defendants, the infants, unless they shall respectively, within six months after attaining their respective ages of twenty-one years, on being served with subpoena to show cause against this decree, show unto this Court good cause to the contrary. <sup>2</sup> Seton Dec. (Eng. ed. 1862) 685.

<sup>1</sup> See another form on decree of divorce *a vinculo*, in *Miller v. Miller*, 6 John Ch. 93, 94.

*(b.) Another form.*

"And it is further ordered, that the said defendants, H. O. H. and S. S. H. respectively do, as and when they shall respectively attain the age of twenty-one years, execute, acknowledge, and deliver sufficient deeds of release of the estates in C. square and near B. street, to said M. K., his heirs or assigns, and of the said estate in C. street, to said J. L., his heirs or assigns, unless the said H. O. H. and S. S. H. respectively shall, within six months after they shall have respectively attained said age of twenty-one years [on being served with subpoena to show cause against this decree], show unto this Court good cause to the contrary; and in the mean time, it is ordered that the said purchasers of said estates, and their respective heirs and assigns, do hold and enjoy the said estates by them respectively purchased, and to them respectively conveyed by said deeds of said Master." [Kelley v. Greenleaf, 3 Story C. C. 93.]

*(c.) Decree absolute against infant.*

Upon motion &c., by counsel for the plaintiff, who alleged, that the defendant A. attained the age of 21 years on the — day of —, and that the said defendant was on the — day of — duly served with a subpoena to show cause against the decree made in this cause, dated &c., as by the affidavit of &c., filed &c., appears, and no cause having been shown to the contrary thereof, as by the —'s certificate also appears, and upon reading &c., this Court doth order that the said decree be made absolute against the said defendant A. 2 Seton Dec. (Eng. ed. 1862) 685.

*(d.) Decree for absolute foreclosure against infant and feme covert, plaintiff paying their costs, and Court deeming it for their benefit.*

And the plaintiff by his counsel offering to pay unto the defendants S., and L., his wife, and G., the infant, their costs of this cause as between solicitor and client, upon an absolute decree of foreclosure being now made as against them; And the defendant S. by his counsel disclaiming all interest in the estate comprised in the indenture of mortgage, in the pleadings mentioned, dated &c., and consenting to an absolute decree; And counsel for the defendant L., the wife of the said S., and for the defendant G., the infant, not asking for liberty to redeem the mortgaged premises, or for any account of what is due to the plaintiff, the Court doth declare that it will be for the benefit of the defendant L., and of the said infant G., to accept the said offer; and doth order that the defendant S., and L., his wife, and the defendant G., the infant, from henceforth stand absolutely de-

barred and foreclosed &c.; and that the plaintiff B. pay unto the said defendants respectively their costs of this cause, to be taxed &c. *Billson v. Scott*, 1856, 2 Seton Dec. (Eng. ed. 1862) 685, 686.

*(e.) Infants declared not bound by decree; accounts; former accounts to be adopted, if beneficial.*

This Court doth "declare, that the plaintiffs are entitled to the benefit of the decree dated &c., and the several proceedings under the same, and subsequent or previous thereto, against all the defendants to this (*supplemental*) cause, except the infant defendant H., the only son of the defendant J., and the first tenant in tail *in esse* under the testator's will; And doth also declare that the said decree and orders, and the accounts taken under the same, are not binding on the said defendant, the infant"; — Usual accounts of personalty, and inquiries as to realty, any accounts settled in testator's lifetime not to be disturbed. — "And if it shall appear to be for the benefit of the infant defendant H. to adopt any of the accounts already taken under the decree and orders in the original cause, such accounts are to be adopted to such extent, or in such respects as shall appear to be for the benefit of the said infant defendant." — And this decree is to be without prejudice as between the plaintiff and all the defendants, except the said infant, to any of the decrees and orders, proceedings and arrangements, made prior to the date hereof. *Adjourn &c.* 2 Seton Dec. (Eng. ed. 1862) 690, 691; *Baillie v. Jackson*, 10 Sim. 167.

*Directions as to shares and income.*

*(f.) Inquiries as to advances, and maintenance, and shares.*

The Court doth order that it be referred to &c., to make the following inquiries, that is to say: — "1. An inquiry, whether the testator in his lifetime gave, advanced, or settled in, for, or upon any, and which of his children, any sum or sums of money, or other property; and if so, what was the amount or value thereof; 2. An inquiry, whether any and what payments, appropriations, or advances have been made by the executors of the will of the testator, since his death, to or on account of the children of the testator, or any, or which of them, in respect of their shares of his residuary estate, or otherwise; 3. An inquiry, of what the residuary, personal, and real estate of the testator consisted." — 4. An inquiry, as to allowance for past and future maintenance and advancement in life of the children of the testator, or any of them, and if so, to whom the same is due. 2 Seton Dec. (Eng. ed. 1862) 698.

*Guardian, maintenance, and education.**(g.) Guardian of person and maintenance.*

(This &c.) appoint B., of &c., guardian of the person of A., the infant, during his minority, or until further order; And it is ordered by the Court that the sum of \$ —— a year be allowed for the maintenance and education of the said infant for the time past, from the —— day of ——, the time of the death of C., his father, and for the time to come during his minority; and be paid to the said B., his guardian, during his minority, or until further order, by equal half-yearly payments, of \$ —— each, on the —— day of ——, and the —— day of ——, in each year, the first of such payments to be made on the —— day of ——, out of the interest from time to time to accrue due on the &c. Standing &c. [*or by the receiver, appointed in this cause, out of the rents and profits of the estates of said A., the infant*]; And let such payments be allowed the said receiver from time to time in passing his accounts. 2 Seton Dec. (Eng. ed. 1862) 700.

*(h.) Order for increase of maintenance.*

It is ordered that the sum of \$ —— a year be allowed in addition to the said sum of \$ —— a year, allowed by the order dated &c., making together the sum of \$ —— a year, for the maintenance and education of A., the infant, for the time to come during his minority [*or such increased allowance to commence on, or as from*]; and be paid to &c.<sup>1</sup> [*as in next form above*].

*(i.) Devise of maintenance of lunatic out of profits insufficient; sale ordered.*

It is declared, that the estate in the pleadings mentioned is charged with the comfortable and reasonable maintenance of *Nelly S.*; and that, if the farm will not, upon lease, yield sufficient for that purpose, the same may and ought to be sold, and the proceeds applied for her support; and that a Master be directed to inquire, and report, what annual sum is requisite for the comfortable and reasonable maintenance of *Nelly S.*, and what is the net value of the yearly rents and profits of the estate, as the same now exists, and may be rented. *Schermerhorne v. Schermerhorne*, 6 John. Ch. 74.

<sup>1</sup> For inquiries in regard to ability of father to maintain infant, see *Kekewich v. Langston*, 11 Sim. 291, 305. Payment of infant's maintenance to father, see *Bateman v. Foster*, 1 Col. 127; *Meacher v. Young*, 2 My. & K. 491. To mother, see *Fentiman v. Fentiman*, 13 Sim. 172.

*Custody of infants.**(j.) Custody of infants committed to mother ; guardians ; provision ; father excluded, except at stated time.*

On petition of the mother and her brother and next friend, and of the infants by the same next friend. It is ordered that "M. and J., the infants, remain in the care and custody of the petitioner, E., their mother." — Appoint petitioner, E., and F. (*next friend*) to act in the nature of guardians to the infants till further order. — And it is ordered, that the petitioner, E., have the charge and superintendence of the education of the said infants, the said petitioner, E., and the said F., by their counsel, undertaking that, until the further order of this Court, they will duly and properly provide for the care, maintenance, and education of the said infants. And it is further ordered that "Y., the father of the said infants, have access not oftener than once in three months, to see the said infants, at his own expense, in the presence of such person as the said E. may appoint, within one mile of their residence in England, for the time being." Liberty to apply.<sup>1</sup> 2 Seton Dec. (Eng. ed. 1862) 714.

*(k.) Order for habeas on motion.*

It is ordered that a writ of *habeas corpus* issue, directing (directed to) the defendants, B., and M. his wife, to bring into this Court the plaintiffs, M., F., and J., the infant children of J. L., at the sitting of this Court, &c., on the — day of —. 2 Seton Dec. (Eng. ed. 1862) 718.<sup>2</sup>

*Leave to take infant out of jurisdiction.**(l.) Residence abroad.*

The Court doth order that the petitioner, the father of the infant plaintiffs, be at liberty to remove the said infants with him to —, or to any other parts and places beyond the seas, and out of the jurisdiction of this Court, in which he shall, in the execution of his duty, be ordered or find it necessary to reside, there to remain with the petitioner if he shall so think fit ; the petitioner, by his said petition (counsel), undertaking to bring the said infants, or such of them as shall then be living, back with him on his return to this country, on the fulfilment of his mission in the petition.

<sup>1</sup> For orders respecting the care and custody of children, see *Re Bartlett*, 2 Col. 661 ; *Hope v. Hope*, 4 D. M. G. 355 ; *Wellesley v. Beaufort*, 2 Russ. 44.

<sup>2</sup> For form of order by the Court where infant brought up on *habeas*, see *Maturd Wollstonecraft*, 4 John. Ch. 83.

tioned, unless the petitioner shall in the mean time, from any unforeseen circumstance, deem it advisable to send them, or any of them, back to this country ; But the petitioner is half-yearly to transmit, properly vouched, to be laid before the Court, the plan of tuition and education for each of the said infants, actually adopted and in practice at the time of such half-yearly return, and specifying particularly where and with whom they reside.<sup>1</sup> Jackson v. Hankey, Jacob, 265, n.

### 3. EXECUTORS AND TRUSTEES.

#### *Accounts.*

#### *(a.) Against executors of sole executor.*

It is ordered that it be referred to &c., to take an account of the personal estate, not specifically bequeathed, of A., the testator in the pleadings named, come to the hands of (received by) B., deceased, the sole executor of his will, and of (by) the defendants C. and D. [*or* C., D., and E.], the executors of the will of the said B., since his decease, or either [*or* any] of them, or of (by) any other person or persons, by the order, or for the use of the said B. or of the said defendants, or either [*or* any] of them ; And it is ordered and decreed that what, on taking the said account, shall appear to be due from the defendants, C. and D. [*or* C., D., and E.], be answered by them personally, and what shall appear to be due from the estate of the said B., deceased, be answered by the defendants, C. and D. [*or* C., D., and E.], as such executors, they having admitted assets of the said B. for that purpose ; [*Or, if assets not admitted, out of his assets in the course of administration ; And in case the said defendants shall not admit assets of the said B. for that purpose, then it is ordered that an account be taken of the personal estate of the said B., come to the hands of (received by) the defendants C. and D., or C., D., and E., or either, or any of them, or of (by) any other person or persons, by the order, or for the use of the said defendants, or either, or any of them.*]<sup>2</sup> 2 Seton Dec. (Eng. ed. 1862) 735. For Form of supplemental decree against administrator of executrix and administrator *de bonis non*, see *Ib.* 736.

<sup>1</sup> For orders for maintenance of infants out of the jurisdiction, see *Stephens v. James*, 1 My. & K. 627 ; *Wyndham v. Ennismore*, 1 Kee. 468 ; *De Weever v. Rockport*, 6 Beavan, 392.

<sup>2</sup> A creditor may come into a Court of Chancery against an executor or administrator, for a discovery and distribution of assets. *Thompson v. Brown*, 4 John. Ch. 619. A very particular and extended form of decree for account is reported in this case.

*Breach of Trust.**(b.) Investment declared improper.*

Decree to perform will, and administer testator's estate: — "And it is declared, that the investment of any part of the personal estate of the testator by the defendant C., either by way of loan upon the deposit of &c., &c. [*foreign or other securities*], was an improper investment; And in taking the accounts of the personal estate of the testator not specifically bequeathed, come to the hands of the defendant C., regard is to be had to the foregoing declaration." *Knott v. Cottee*, 16 Beav. 77; 2 Seton Dec. (Eng. ed. 1862) 748.

*(c.) Improper investment made good by instalments, without prejudice to appeal; security to be realized.*

It is declared by the Court, that the investment of the sum of \$7,320, in the pleadings mentioned, on the security of the estates comprised in the indenture of &c., in the pleadings mentioned, was, so far as regards the plaintiff, a breach of trust on the part of the defendant A. Directions by arrangement for defendant A. to make good plaintiff's share of fraud, with interest at \$ — per cent by instalment. — "And in default of such payments as aforesaid, or any of them, and in case the mortgage security in the pleadings mentioned shall not have been previously realized, it is ordered that the same be realized; And, for that purpose, it is ordered, that the plaintiff, after any such default, be at liberty to make such applications as she may be advised to the commissioners for sale of &c.; And that the defendant A. and the plaintiff be at liberty to bid at the sale; And it is declared by the Court, that in case of any such default, the plaintiff, out of such part of the money arising from any sale, as shall bear to the whole produce of the sale the proportion of \$3,965 to \$7,320, is entitled to be paid the amount then due to her." — Defendant A. to pay plaintiff's costs of suit, to be taxed. — "And by consent of the plaintiff (by her counsel), any consent or admission on the part of the defendant A., or other matter herein contained, is not to prejudice or affect any right of appeal by or on the part of the defendant A." 2 Seton Dec. 748, 749.

*(d.) Debentures fraudulently disposed of by trustee without concurrence of co-trustee, to be deposited in Court by alleged purchaser; account of interest.*

It is ordered that "the defendant L. (*purchaser*) on or before &c., deposit in a tin box, under lock and key, in the presence of plaintiff's solicitor, Mr. —, the two debentures of the — Railway Co., and the

remaining coupons attached or belonging thereto, numbered respectively &c., in the bill mentioned; And that such box be indorsed, 'In Chancery, G. v. P., Securities'; And that the defendant L. on or before &c., deposit such box in the Bank &c., to the credit of this cause, subject &c." Account of interest on the said debentures received by defendants P., R., and L., [in whose hands the debentures had been,] or any of them, and they to pay to the plaintiff what shall be found due from them respectively; Defendants, including D. (*fraudulent trustee*), to pay plaintiff's cost of suit; Defendant L. only so far as they are increased by making him defendant.—— Liberty to apply. 2 Seton Dec. (Eng. ed. 1862) 749.

(e.) *Inquiry as to wilful default; bankrupt or insolvent trustee.*

It is ordered that it be referred to &c., to take the account and make the inquiry following, that is to say:— 1. An account of all such of the moneys or funds comprised in the indenture dated &c., in the pleadings mentioned, or from time to time subject to the trusts thereof, as have been procured or received by the defendant C. (*bankrupt or insolvent debtor*), or by any person &c., or which, without his wilful (neglect and) default, have been so possessed or received, and of his dealings with and investments of such moneys or funds, and of his application and disposition thereof, and of the dividends, interest, and annual proceeds thereof; 2. An inquiry, whether anything, and what, is due from the defendant or his estate in respect thereof. Adjourn &c. 2 Seton Dec. 751.

(f.) *Further order for leave to prove the balance.*

It is ordered that the plaintiff be at liberty to go in and prove against the estate of the defendant C. the bankrupt [or the insolvent debtor], under the adjudication in bankruptcy [or proceedings in insolvency] against the said defendant for the sum of \$——, the balance appearing by the Master's report, dated &c., to be due from him or his estate in respect of the money or funds comprised in the indenture dated &c., or at any time subject to the trusts thereof, and also for the dividends, interest, and annual proceeds thereof, and for the plaintiff's costs in this cause, to be taxed &c.; but so as not to disturb any dividend already declared. Liberty to apply. 2 Seton Dec. (Eng. ed. 1862) 751.

(g.) *Account and inquiry as to the trust funds under two settlements.<sup>1</sup>*

It is ordered that "the decree, dated &c., be varied; and it is further ordered and decreed that it be referred to &c., to take the following ac-

<sup>1</sup> For a form of decree vacating a purchase of an estate, by the trustees for selling and ordering a resale &c., see *Davove v. Fanning*, 2 John. Ch. 271.

count and make the following inquiry, that is to say: 1. An account of the trust funds and property come to the hands of the plaintiff as trustee under each of the indentures of settlement, dated respectively &c., in the pleadings mentioned, either solely or jointly with his co-trustee or co-trustees, under the said indentures respectively; 2. An inquiry, whether the said trust funds and property are now in the possession of the trustees respectively, and whether in the same state of investment as at the time when such trust funds and property came into the hands of the said trustees, or in any other and what state of investment; but such account and inquiry respectively are not to extend to the income of the said trust funds and property." So much of the decree as directs the taxation and payment and apportionment of costs to be reversed; reserve the consideration of the costs of suit, and of the account and inquiry hereby directed; costs of appeal to be costs in the cause. Adjourn &c. 2 Seton Dec. (Eng. ed. 1862) 751.

(h.) *Inquiry if executors have recovered moneys.*

It is ordered that it be referred to &c., to make an inquiry, what part of the personal estate comprised in and assigned by the indenture of settlement dated &c., in &c., came to the hands of S. and R., the trustees of the said settlement; and what funds were in the hands of the said trustees at the death of E., the testatrix in &c., and what has become of all such funds as came to the hands of the said trustees, and whether the same or any, and which of them, might have been recovered from the said trustee by M. and T., the executors of the said E., after the decease of the said E.<sup>1</sup> 2 Seton Dec. (Eng. ed. 1862) 752.

<sup>1</sup> A trustee, who suffers funds to pass improperly into the hands of his co-trustee, is chargeable for any loss arising from such negligence or abuse of trust. *Mumford v. Murray*, 6 John. Ch. 1. So a defendant, who suffered moneys received under an order in favor of himself and the plaintiff, as partners, to be blended with moneys received by him under a subsequent *trust deed* to him and another, to pass into the hands of his co-trustee, was held accountable to the plaintiff, notwithstanding the plaintiff, as one of the *cestui que trusts*, had joined in a discharge of such co-trustee, but without a knowledge of the fact of the first money being so blended with moneys received under the trust deed. *Mumford v. Murray*, *supra*. A trustee, who mingles the trust money with his own, and uses it as his own, must pay *interest*. *Mumford v. Murray*, *supra*. See this case for the outlines of a *decree* involving a consideration of the above points. Where an administrator of a deceased partner, without applying to the Court for its direction, permitted the surviving partner to sell the joint stock, in the usual course of trade, for the joint benefit of himself and the intestate's estate, and put into the hands of such surviving partner, *assets* which the administrator had in his own hands, and under his own control to trade with, he was held answerable for the loss. *Thompson v. Brown*, 4 John. Ch. 619. See form of decree in this case. Where a trustee, though called on for that purpose, refused to exhibit to referees appointed by the Court, by consent of parties, an account of the rents and profits of certain parts of the trust estate, he was held chargeable with what, in the opinion of the referees, such parts of the estate would reasonably have produced. *Green v. Winter*, 1 John. Ch. 26, and Form of Decree, pp. 42-44.

*Charging with interest.**(i.) Inquiry as to employment of balances.*

It is ordered that it be referred to &c., to inquire and report "how and in what manner the personal estate of the testator possessed by (come to the hands of) the defendant C., has been employed by him, and what balances in respect thereof have remained in his hands, and during what time respectively."

*(j.) Directions for annual rests and compound interest.*

Accounts of personal estate; personalty not specifically bequeathed to be applied to pay debts and legacies. "And let the balance of the residuary personal estate of the testator in the hands of the defendant W., at the death of C., in the pleadings named, be ascertained; and let annual rests be made of the clear balance of such personal estate in the hands of the defendant W. since the death of the said C.; and let interest be computed on the balance which shall be ascertained as aforesaid, at the rate of \$ — per cent per ann., and in making such annual rests (except the first) the interest of each preceding balance is to be included in the balance then stated, so as to charge the said defendant with compound interest thereon." Account of rents and profits since the death of the said C. received by defendants W. and S. &c.; and in taking such account, annual rests are to be made of the clear balance of such rents and profits in the hands of the defendant W.; and let interest be computed on such respective balances at the rate of \$ — per cent per ann.; and in making such annual rests, except the first, the interest of each preceding balance is to be included in the balance then stated, so as to charge the said defendant W. with compound interest thereon. *Cotham v. West*, 1 Beav. 381. 2 Seton Dec. (Eng. ed. 1862) 762.

*Costs and expenses.**(k.) Costs, charges, and expenses, beyond costs of suit.*

It is ordered that it be referred to &c., to tax the costs of the plaintiffs and defendants (all parties) of this cause, the costs of the defendants B. and C., the executors of the will of A., the testator in the pleadings named [or the trustees of the will of &c., or of the indenture dated &c., or of the legacy &c., in the pleadings &c., mentioned] as between solicitor and client [if so, add, incurred subsequent to the last taxation], including in such taxation any costs, charges, and expenses, properly incurred by them, relating to the administration of the testator's estate [or the execution of the trusts of

the testator's will, *or* the said indenture, *or* the said legacy, *or* as such executors *or* trustees] beyond their costs of this cause ; if there has been any former taxation, or any charges &c. have been allowed in the accounts, add, and not already taxed and allowed.

(l.) *Same to be raised by the trustees.*

And let the said costs, and costs and charges, and expenses, when so taxed, be raised and paid by the said defendants, the trustees, by sale of sufficient part of the &c., standing in the names &c. 2 Seton Dec. 767.

(m.) *Inquiry as to costs, charges, and expenses.*

And it is ordered that the Taxing Master do inquire whether the plaintiff [*or* defendant] A. has properly incurred any and what costs, charges, and expenses relating to the administration &c., beyond the costs of this cause (suit) ; and if so, let him tax and include the same in the costs of the said plaintiff [*or* defendant] hereinbefore directed to be taxed.

(n.) *Decree for costs in a suit by trustee to obtain instructions ; as between solicitor and client ; charging it on different funds.*<sup>1</sup>

“ It is further ordered, adjudged, and decreed, that all the costs in this suit, including counsel fees, shall be paid out of the property in controversy in the cause, and as the different parties having different interests therein have waived all right of appeal from this decree, and have seen and examined the charges for counsel fees and services made and presented by the respective counsel, and made no objection thereto, and have agreed as to the mode of apportioning the costs and charges upon the property in controversy, it is further ordered, by the consent of the parties, there be paid to S. E. S., Esquire, as solicitor and counsel for the plaintiff, for costs and counsel fees, nine hundred sixty dollars twenty-two cents ; to C. C., Esquire, as solicitor and counsel for W. C. J., for costs and counsel fees, one thousand and seventy-nine dollars thirty-two cents ; to R. S. S., Esquire, as guardian *ad litem* of J. Q. A. J., for costs, counsel fees, and services for other defendants, nine hundred and twenty-nine dollars thirty-two cents ; to F. E. P., Esquire, as guardian *ad litem* and counsel for M. A. J. and L. C. J., for costs and counsel fees, three hundred and four dollars thirty-two cents ; to R. H. D., Junior, Esquire, as counsel for M. C. A., for costs and counsel fees, two hundred and eleven dollars and eighty-two cents ; to C. W. T., Esquire, as solicitor for M. C. A., one hundred dollars ; amounting in the whole to the sum of three thousand five hundred and

<sup>1</sup> See 2 Seton Dec. (Eng. ed. 1862) 162, 163, 166.

eighty-five dollars ; and that the said plaintiff, when he pays the said costs, shall pay out of the following funds their respective shares of said costs, as follows, to wit, from the capital of the trust funds held by him under the eighth clause of said will, seventeen hundred and twenty-three dollars ninety cents ; from the interest of the same, two hundred and forty-eight dollars twenty-five cents ; from the interest of said twenty thousand dollars bequeathed by the tenth clause of said will, one thousand and one dollars sixty-five cents ; from the proceeds of real estate, being stocks in Massachusetts, held by plaintiff as trustee under the thirteenth clause of said will, four hundred nineteen dollars seventy cents ; from the income of the same sixty dollars, forty-six cents ; from the annuity payable to said M. C. A., one hundred and thirty-one dollars five cents.

By the Court.

\_\_\_\_\_, Clerk.

[Adams v. Johnson, C. C. U. S. Mass., Oct. 7, 1861.]

In Equity.

*Appointing new trustees.*

(o.) *Decrees to appoint new trustees.*

The defendant B., by his answer [*or counsel*], declining to act in the trusts of the testator's will [*or vested in him by the articles of settlement, or indenture*], dated the — day of — in the pleadings mentioned, and desiring to be discharged therefrom, (this Court doth hereby) appoint D. and E. [*or let two or more proper persons be appointed*] trustees of the said will [*or articles &c.*] in his place [*jointly with C., the continuing trustee*] ; And let the defendant B. [*and C.*] convey [*assign and transfer*] the trust estate [*funds, property, and securities*] vested in him [*or them*] by the said will [*or articles &c.*], and the £ — standing in the name of &c., in the books of the bank of —, as in the pleadings mentioned or the residue thereof after payment of the costs, hereinafter mentioned, so as to vest the same in the said D. and E. [*or the trustees so to be appointed, if so, jointly with the said C.*], upon the trusts mentioned in [*or declared by*] the said will [*or articles &c.*], or such of them as are now subsisting or capable of taking effect [*or subject to the trusts mentioned in the said will dated &c., or articles &c.*], concerning the same &c. [*If stock, add, and they are to declare the trusts thereof accordingly*] ; And let such conveyance [*or assignment, or declaration*] be settled by the Judge [*or Court, or Master*]. [*If no infants or married women, in case the parties differ ; If deeds in defendants' hands, And let the defendant B. deliver to such new (and continuing) trustees upon oath, all deeds and writings in his custody or power, relating to the said trust estates &c. ; If trustee to have his costs, Tax the*

defendant B. his costs of this cause (suit), as between solicitor and client; And let defendant B. [and the said C.] be at liberty to raise and retain the same out of the said trust estate, or funds &c.] Liberty to apply. ? Seton Dec. (Eng. ed. 1862) 778.

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#### 4. SOLICITORS.

##### *(a.) Order nisi to strike solicitor off the roll for misconduct.*

And upon the matters appearing to this Court in the evidence in this cause, It is ordered, that T., one of the solicitors of this Court, be struck off the roll of solicitors of this Court, unless he shall on the — day of — show unto this Court good cause to the contrary.

##### *(b.) Order absolute ; cause not shown, or disallowed.*

Whereas by an order &c. [*Recite order nisi, and order to substitute service on defendant's solicitor*]. Now upon motion &c., of counsel for the plaintiffs who alleged that the said defendant T. hath been duly served with the said order, dated &c., as by affidavit of —, filed &c., appears, and upon reading the said order and affidavit, and no cause having been shown this day to the contrary, this Court doth order that the name of the said defendant T. be struck off the roll of the solicitors of this Court. ? Seton Dec. (Eng. ed. 1862) 865, 866.

## CHAPTER XXI.

## SUMMARY AND ANCILLARY RELIEF.

## SECTION I.

## INJUNCTIONS.

## 1. FORM OF ORDER.

*(a.) Injunction on notice, or ex parte, on undertaking as to damage.*

Upon motion &c., by counsel for the plaintiff, and upon hearing counsel for the defendant [*or reading an affidavit of notice of this motion to the defendant, or if moved ex parte before the defendant has appeared to the bill, the clerk's certificate of the filing of the plaintiff's bill in this cause on the — day of —*]. [*Enter affidavit in support and in opposition, if any; And if ex parte, add, And the plaintiff, by his counsel, undertaking to abide by any order this Court may make as to damages, in case this Court should hereafter be of opinion that the defendant shall have sustained any, by reason of this order, which the plaintiff ought to pay, If so, and also undertaking to accept short notice of motion to dissolve the injunction hereby awarded*], This Court doth order, that an injunction be awarded to restrain the defendants A., his servants, workmen, and agents from &c.; until the hearing of this cause, or until the further order of this Court.

*(b.) Ex parte interim order.*

Usual undertaking as to damage [Form above].— Let the defendant, his servants, workmen, and agents, be restrained from &c.; until after the — day of —, or until the further order of this Court [*If so, And let the plaintiff be at liberty to serve the defendant with a notice of motion for the — day of —, for an injunction in this cause.*]

*(c.) Ex parte injunction.*

Upon the application of the plaintiffs, and upon reading an affidavit of &c. [*Enter evidence*]; and the plaintiffs, by their solicitors, having undertaken &c. [Form above], and having signed &c., to that effect, accordingly this Court doth order that an injunction be awarded &c. 2 Seton Dec. (Eng. ed. 1862) 867.

*(d.) Another Form, provisional. (Mass.).*

At Chambers, Boston, May 14, 1862.

Let an injunction issue in conformity with the prayer of the bill, to continue until the further order of the Court or some justice thereof.

E. R. H.,

J. S. J. C.

*(e.) Inquiry as to damages, to be paid according to undertaking.*

Upon motion for a decree &c. — “This Court doth declare, that the plaintiff is not entitled to any relief claimed by his said bill against the defendants, or any of them; And upon the plaintiff’s undertaking contained in the order dated &c., to pay any sum which this Court might direct by way of damages to the said defendants, by reason of the sale of the book in the said bill mentioned, called &c., having been stopped, pursuant to the undertaking given, by the said defendants to that effect, on the — day of —, it is ordered that it be referred to &c., to inquire and report what damages have been sustained by the defendants by reason of the sale of the said book having been so stopped; And that the plaintiff N., within one month from the date of the Master’s report, to be made pursuant to this order, pay the amount which shall be thereby found due (for damages in respect of the matters aforesaid) to the defendants R. and W. &c.” — And thereupon recognizance entered into to answer damages to be vacated; And all further proceedings to be stayed. Plaintiff to pay defendants’ costs of suit, and of motion for injunction.<sup>1</sup> *Napier v. Routledge* (1859), 2 Seton Dec. (Eng. ed. 1862) 868.

## 2. STAYING PROCEEDINGS IN OTHER COURTS.

*(a.) Staying present and future action.*

This Court doth order that an injunction be awarded to restrain the defendant T., his attorneys and agents, from further prosecuting the action commenced (by the defendant) against the plaintiff (in the — Court &c.), as in the bill mentioned, to recover the amount of principal, interest, and costs secured by the indenture dated &c., in the plaintiff’s bill mentioned; and from commencing (or prosecuting) any other action at law (or taking any other proceeding) against the plaintiff for the recovery of such principal interest, and costs, or any part thereof, until the hearing of this cause, or until the further order of this Court. 2 Seton Dec. (Eng. ed. 1862) 874, 875.

<sup>1</sup> In *Merryfield v. Jones*, 2 Curtis C. C. 306, it was decided that a Court of Equity cannot order the plaintiff and his sureties on an injunction bond, to pay the damages sustained by reason of the injunction. The defendant must resort to an action on the bond.

*(b.) Leave to proceed with action, but execution stayed.*

It is ordered, that the defendant be at liberty to proceed with the action at law commenced by him against the plaintiff (in — Court &c.), respecting the matters in the plaintiff's bill mentioned; And in case the defendant shall obtain judgment in the said action, he is not to sue out execution thereon, or take any other proceedings thereunder, until the further order of this Court. Liberty to apply. Costs of application to be costs in cause. 2 Seton Dec. (Eng. ed. 1862) 875.

*(c.) To stay sale and withdraw, where execution issued after notice of decree.*

It is ordered that &c., to restrain H. from selling or disposing of any part of the property and effects of and belonging to, or forming part of, the estate of V., the intestate, taken in execution by the sheriff of M., under and by virtue of the writ of *fi. fa.*, sued out in the action in the Court of &c., wherein the said H. is plaintiff, and the defendant V., as administratrix of the said estate, is defendant, and from taking any further proceedings in the said action, or under the said execution; And it is ordered that the said H. withdraw from the possession of the property and effects of the said intestate so taken in execution, as aforesaid. 2 Seton Dec. (Eng. ed. 1862) 888.

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### 3. WASTE, TRESPASS, AND NUISANCE.

*(a.) Injunction to stay felling ornamental timber and other waste.*

This Court doth order that an injunction be awarded to restrain the defendant D., her agents, servants, and workmen, from cutting down any timber or other trees growing on the estate in the plaintiff's bill mentioned, which are planted or growing thereon for the protection or shelter of the several mansion-houses belonging to the said estate, or for the ornament of the said houses, or which grow in lines, walks, vistas, or otherwise, for the ornament of the said houses, or of the gardens or parks or pleasure-grounds thereunto belonging; And it is further ordered, that the injunction do also extend to restrain the defendant D., her servants, workmen, and agents, from cutting down any timber or other trees, except at seasonable times, and in a husband-like manner; and likewise from cutting down saplings and young trees, not fit to be cut as and for the purposes of timber; Until &c. *Chamberlayne v. Dummer*, 1 B. C. C. 166; 2 Seton Dec. (Eng. ed. 1862) 891.

(b.) *The like ; and trees to intercept view ; and other waste.*

“ Or which were planted for the purpose of intercepting the view of objects intended to be kept out of sight.” — “ And also from committing any other spoil or destruction on the said estate.”

(c.) *The like ; and trees to shade or shelter.*

“ Standing or growing for ornament, shade, or shelter of the mansion and buildings at &c., or any other houses or buildings on the settled estates.”

(d.) *Injunction and inquiry as to timber cut by life tenant, sans waste, except &c.*

Bill by remainder-man against assignee of life estate, without impeachment of, or in any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses and buildings to go to decay, and not repairing the same.

This Court doth declare, that according to the true construction of the indenture dated &c., in &c., the defendant S., as assignee of the life estate of V., is entitled to cut all such timber and wood growing on the estates in question, not being trees or wood planted or left standing or growing there for the protection or shelter of the mansion-house, called &c., in the bill mentioned, or for the ornament of the said house, or which grow in lines, walks, or otherwise for the ornament of the said house, or of the gardens, or park, or pleasure-grounds thereunto belonging, or as owner in fee simple, having regard to his present interest, and also to the permanent advantage of the estate, might cut in a due course of management ; And the defendant S., by his counsel, undertaking after the present month to give to the plaintiff notice, a fortnight previously to his cutting trees or wood, specifying the trees or wood which he intends to cut.” — Injunction to stay defendant S., his servants &c., “ from cutting any trees or wood growing upon the said estates or any part thereof, being trees or wood planted &c., [see above] thereunto belonging, or being such trees or wood as an owner in fee simple, having regard to his present interest and also to the permanent advantage of the estate, would not cut in due course of management.” — But nothing in this decree contained is to prevent the said defendant S. from cutting any underwood on the said estates which shall have become fit to cut, according to the custom of the country ; And it is ordered, that it be referred to &c., to inquire and report, whether any and what timber or wood (other than such timber or wood as the said defendant S. was entitled to cut according to the description aforesaid), has been cut by the said defendant S., upon the said estates ; 2. And if so, then

that said Master do take an account of such timber or wood so cut, and of the proceeds and value thereof. Adjourn &c. *Vincent v. Spicer*, 22 Beav. 880 ; 4 W. R. 667 ; 2 Seton Dec. (Eng. ed. 1862) 893.

(e.) *Staying waste by tenants in common.*

This Court doth order, that an injunction be awarded against the defendant A., to restrain him, his servants, workmen, and agents, from cutting down any timber, or other trees, or underwood, from off the estates in the bill mentioned at unseasonable times ; until &c. 2 Seton Dec. (Eng. ed. 1862) 894.

(f.) *Staying pollution of a stream ; nuisance.*<sup>1</sup>

This Court doth order, that a perpetual injunction be awarded to restrain the Local Board of Health for the town of —, their agents, servants, and workmen, from causing or permitting to pass any sewage, filth, or other offensive matter, either solid or liquid, down or through any sewer or drain into the river W., in the bill mentioned, to the injury of the plaintiff. 2 Seton Dec. (Eng. ed. 1862) 894.

(g.) *Decree establishing right to oyster fishing and quieting in possession, with perpetual injunction.*

Upon motion, proof of title, and affidavit of service on the defendants, — This Court doth “declare, that the plaintiff and his assigns, and every other the person or persons claiming or to claim under or by virtue of the will of &c., is and are entitled to the exclusive right to use the piece or parcel of ground (land), part of the soil or bed of the Straits of Menai, lying and being between &c., and the water or waters covering the same, as beds or a bed for oysters or oyster spat, and to put down and replace, and to dredge, take, and carry away, oyster spat and oysters therefrom ; And decree that the plaintiff be quieted in the exclusive possession of the oyster fishery or oyster fisheries situate, lying, and being upon or within the said piece or parcel of ground (land), or the water or waters covering the same ; And the Court doth order that a perpetual injunction be awarded to restrain the defendants J., K., &c., and each and every of their agents, servants, and workmen, from using the said piece or parcel of ground (land), water or waters, and every part thereof, as beds or a bed for oyster spat or oysters, and from putting down or dredging, taking and carrying away any oyster spat and oysters thereupon or therefrom, and from moving or in any man-

<sup>1</sup> For other forms of injunction to stay nuisances, see *Walter v. Selfe*, 4 D. & S. 325 ; *Pollock v. Hester*, 11 Hare, 275 ; *Bostock v. N. Staff. Ry.*, 5 D. & S. 590 ; S. C. 3 S. & G. 283 ; *Case v. M. R. Co.*, 27 Beav. 254, note.

ner disturbing the oyster spat or oysters now, or at any time, lying, and being upon or within the said piece of ground (land), water or waters, and from interfering with or in any way hindering the enjoyment, use, or occupation by the plaintiff and his assigns, and every other the person or persons claiming or to claim under or by virtue of the said will of the said &c., of the said piece or parcel of ground (land), and the water or waters covering the same, as an oyster bed or oyster fishery.”<sup>1</sup> *Bulkley v. Jones* (1856), 2 Seton Dec. (Eng. ed. 1862) 895, 896.

(h.) *Staying diverting or restraining flow of water.*

Order of the 29th of June, 1859, to be discharged, and injunction dissolved, and instead: “The Court doth order that an injunction be awarded to restrain the defendant from diverting the water in the ponds or springs situated between the south embankment of the reservoir and the boundary wall in the pleadings mentioned, so as to prevent the same from flowing into the river P.; and from employing any steam-engines, pumps, or any other means of using the water in the said ponds or springs, so as to diminish the quantity of the said water which flows into the said river; and also to restrain the defendant from diverting the course of the water which flows from surface springs on the south side of the wall which extends from east to west on S. Hill, so as to prevent the same from flowing in its natural course towards and into the said river.” Plaintiff and defendant agreeing that the legal right as to the matters in question be decided by &c. And the Court doth declare, “that the plaintiff is not entitled to the use of the water in the pond called P.’s Pond.” *Ennor v. Barwell*, (1860.) Leave was afterwards given to bring an action. S. C., 1 D. F. J., 530; 2 Seton Dec. (Eng. ed. 1862) 901.<sup>2</sup>

(i.) *Decree for abating and reducing a mill-dam which caused the water to flow back on mills above; but so framed as to conclude neither party as to the right to raise flash boards in the dam in certain states of the river. Injunction not again to raise dam so reduced.*

*Final decree.*] This cause came on again to be heard upon the Master’s report, and the exceptions taken thereto by the parties respectively, and was argued by counsel. On consideration whereof, it was ordered, adjudged, and decreed by the Court, that the exceptions of the said parties

<sup>1</sup> See Form of order declaring an exclusive right of navigation, and enjoining an infringement of it, in *Ogden v. Gibbons*, 4 John. Ch. 174, 182, 183.

<sup>2</sup> See other forms in *Thomas v. Jones*, 1 Y. & C. C. 526; *Caddon v. Morley*, 7 Har. 207; *Powell v. Aiken*, 4 K. & J. 359, and note; *Beaufort v. Morris*, 6 Hare, 346, 348; *Dugdale v. Robertson*, 3 K. & J. 701, and note.

respectively be, and the same are hereby overruled, and that the said report do stand in all matters confirmed except as hereinafter stated. And it not appearing by the answers of the defendants that they assert any right or title to the Eel dam, in the said answers stated, under the owners thereof, by operation of law or otherwise, nor what the true nature and extent of the right and title of the said owners of said Eel dam were and are; It is, thereupon, further ordered, adjudged, and decreed, that the said Albion dam in the said pleadings mentioned ought to be reduced from its height, at the time of the filing of the plaintiff's bill, the space of twenty-four inches from the top thereof, as a nuisance to the privileges and mills of the plaintiffs in the same bill mentioned, and in violation of their rights thereto; and the said defendants are hereby ordered to abate and reduce the said Albion dam the said twenty-four inches accordingly, within forty days from the entering of this decree. And it is further ordered, adjudged, and decreed, that the said defendants, their heirs and assigns be, and they hereby are, perpetually enjoined, after the same Albion dam is so abated and reduced as aforesaid, never thereafter to raise the same dam above the level to which the same shall be so abated and reduced as aforesaid. And it is further adjudged and decreed, that a writ of injunction do issue forthwith against the defendants, commanding them to comply with all and singular the premises so enjoined upon them.

And inasmuch as it appears from the Master's report that in low states of the river, when it is not obstructed by snow and ice, the defendants might, without injury to the plaintiffs, put flash-boards on their dam sixteen inches and one half wide, and the same keep up, until the water in the river flows over the top of them with their present mill gates drawn, and it is not the intent of the Court, in any manner, to act upon this part of the said report, but to leave the parties respectively to their respective rights in regard thereof in the same manner as if the same were not stated in the same report; It is further ordered and declared, that no part of this decree is to be construed in any manner to affirm or deny the right of the defendants to put up such flash-boards; but the parties are left to their respective rights in the premises, as if the same were not stated in the report.

And it is further ordered and decreed, that the plaintiffs do recover their costs in the premises.

[Mann v. Wilkinson, 2 Sumner, 276, 277.]

(j.) *Interlocutory decree, ordering reference for inquiry.*

And now this cause coming on to be heard &c., &c., it is ordered by the Court, that it be referred to T. R., Esq., as Master, with directions to ascertain and report to this Court upon the evidence in the cause, and such other

evidence as he may deem necessary, and such experiments as he may choose to direct, to what extent, if any, the erection of the Albion Dam has obstructed or does obstruct the natural flow of the water from the plaintiffs' mill and lands, and to what extent it will be required to be lowered, if any, in order to restore the flow of said water to its state before said erection; and that he have authority to summon witnesses, administer oaths, and exercise all the usual powers of Master in Chancery in such cases, and that he have authority in particular to direct the parties to stop their several mills if necessary, in order that all such experiments as the Master may think requisite to be made may be made, and for the same purpose, if necessary, to direct that the dam may be lowered and ponds drawn off, and to compel the obedience of the said parties to all orders made by him in the necessary discharge of the duties of his appointment. And that he may report to this Court of his doings in the premises, when he shall have performed the duties of his said appointment.

And the said Master is in the mean time specially directed to proceed immediately to ascertain by actual experiments, conducted by skilful engineers, to be chosen by himself and with notice to the parties, the effect on the plaintiffs' works of lowering the Albion dam to the height at which it stood before the erection thereon of 1828, that is to say, two feet below its present height, that these experiments be made at different states of the river, so as to show the effect aforesaid at those several states respectively, that the Master have authority to direct the defendants to draw off the water in their pond, by gates or by reducing the height of the dam or by any other means so that the said experiments may be fully and satisfactorily made, at the said several depths of water in the river. That the said Master cause these experiments to be made forthwith, and that he report the result thereof specially to this Court. And that the Master have also authority by such experiments to ascertain the effect of lowering said dam to intermediate stages less than two feet, at the said several states of the water; and that he have authority to direct and order both parties to stop their respective works if necessary, and to do and perform whatever he may judge necessary, in order to render such experiments complete and satisfactory.

Nov. Term, 1833.

Ordered as above.

B. C., Clerk.

The parties agree that S. B. C. and R. S. S. be the engineers to be employed by the Master.

Witness, B. C., Clerk.

*(k.) Another decree in like case.***W. & D. D. F. v. Blackstone Canal Co.**

This cause came on at the last term of this Court to be heard upon the bill and answer, and other proceedings and evidence in the case, and was argued by counsel.

On consideration whereof it is adjudged and declared by the Court, that the plaintiffs have sufficiently established in evidence the grievance complained of in their bill; that the defendants have not established any right to raise Woonsocket dam and flow back the water of the Blackstone river upon the plaintiffs' mills in the manner set forth in the plaintiffs' bill under the acts of incorporation of the State of Massachusetts or of the State of Rhode Island, or any of them set forth in the defendants' answer, or under the agreement set forth in the same answer, and that the raising of the said dam as aforesaid, so far as it has injured the plaintiffs in the manner set forth in the bill, is a nuisance to the plaintiffs, and ought to be abated, and that a perpetual injunction ought to issue to the defendants, prohibiting them from hereafter keeping of, continuing, or after abatement from again raising the said dam to any height which shall be a nuisance to the plaintiffs as aforesaid. And it is decreed by the Court accordingly; but inasmuch as it does not appear to the Court what lowering of the said Woonsocket dam, not exceeding two feet, will abate and remove the nuisance to the plaintiffs as aforesaid; it is therefore further ordered, adjudged, and decreed, that it be referred to a Master to be named by the Court, to inquire into and to report at a future time to the Court how much the said dam ought to be lowered, not exceeding two feet, as aforesaid, in order to remove and abate the nuisance to the plaintiffs as aforesaid, and the said Master is hereby authorized, at the expense of the parties or either of them, as shall be hereafter directed by the Court, in addition to an examination of all the papers and evidence in the cause, which are hereby referred to him to make and cause to be made further examinations by witnesses under oath, and by real surveys and other proceedings to be had by him in the premises, as he shall deem meet and proper to accomplish the purposes hereinbefore stated.

And the said Master shall cause due notice to be given to the parties of all meetings to be had and held by him, for the purposes aforesaid, at which meetings the parties shall be at liberty to attend and examine and prove all proper matters, with the assistance of counsel; and the Master shall, as soon as he shall have completed his proceedings, make due report thereof to the Court, and that in the mean time all future proceedings and decrees be reserved for the consideration of the Court.

JOSEPH STORY.

In this case the decree is entered as on file, and thereupon by agreement of parties, it is further ordered, that all and every further and other proceedings in said bill and decree be forever stayed, each party to pay the costs of their own depositions, surveys and witnesses.

The Clerk's and Marshal's fees to be equally paid by the parties.

[Farnum v. Blackstone Canal Corp., 1 Sumner, 46.]

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4. DECREE TO RESTRAIN THE USE OF REAL ESTATE IN VIOLATION OF AN AGREEMENT RESPECTING ITS OCCUPATION.

And now this cause having been fully heard, it is ordered and decreed that the demurrer be overruled. Thereupon the said defendants, by the agreement of their counsel on file in the cause, do consent that the plaintiff's bill be taken as confessed by them, and all the facts therein stated as fully proved and established on the part of said plaintiffs; and that thereupon this Court shall render such final decree in favor of the plaintiffs as by the law of this Commonwealth and the facts so established they are properly entitled to have, and according to the prayer of their bill, with taxable costs in favor of said plaintiffs.

The Court doth thereupon decree, that the said defendants, and each of them, their agents, assistants, and abettors, be forever hereafter perpetually enjoined, and they are hereby enjoined, to desist and refrain from all use of the premises numbered two on Hayward Place aforesaid, or any portion of the same; and from appropriating or applying the same to the purposes of a restaurant, eating-house, saloon, or any similar use, by whatever name called or known, and from all use or application of said lot, or the buildings thereon, or any portion of the same, for any purpose whatever, except that of a "dwelling-house only," and that in the ordinary common acceptance of that term.

And it is further decreed that the plaintiffs recover of the defendants their legal, taxable costs in the premises.

And it is further ordered that the Clerk of this Court do issue a proper writ of injunction, for the carrying the other portions of this decree into effect, on application of the plaintiffs, at any time after the first day of May next.

By the Court.

Boston, Feb. 8th, 1864.

G. C. W., Clerk.

[Parker v. Nightingale, 6 Allen, 341.]

## 5. COPYRIGHT.

*(a.) Staying publishing newspaper.*

This court doth order that an injunction be awarded to restrain the defendants B. and H., their servants, workmen, and agents, from printing and publishing, composing, and offering to sale, the newspaper in the pleadings mentioned, called "The Real John Bull," or "The Old Real John Bull," and from printing, or publishing, or exposing, or offering for sale any newspapers or newspaper as and for a continuation of the plaintiff's said newspaper called "The Real John Bull," until &c. *Edmonds v. Benhow*, 2 Seton Dec. (Eng. ed. 1862) 905.

*(b.) Staying partial infringement.*

This Court doth order that an injunction be awarded to restrain the defendant, his servants, agents, or workmen, from printing, publishing, selling, or otherwise disposing of, such parts of the book in the bill mentioned to have been published by the defendant as hereinafter specified, viz., that part of said book of the defendant which is entitled &c., and also that part thereof which is entitled &c.; until &c. 2 Seton Dec. (Eng. ed. 1862) 905.

*(c.) Perpetual injunction upon printing, publishing, &c.*

"This cause came on to be heard, at this term, upon the bill and answer, and the Master's report, and was argued by counsel, on consideration whereof, it is ordered, adjudged, and decreed, that the Master's report be, and the same hereby is, approved and confirmed; And thereupon it is further ordered, adjudged, and decreed by the Court, that said defendants be, and they hereby are, severally and perpetually restrained and enjoined from printing, publishing, selling, or exposing to sale, or causing or being in any way concerned in the printing, publishing, selling, or exposing to sale, of any copy or copies of the whole or any part of the three hundred and fifty-three pages copied, as reported by the Master in said *Life of Washington*, mentioned in the bill and answer, published by the defendants, from the *Life and Writings of Washington*, mentioned in the bill and answer, published by the plaintiffs; and that the plaintiffs recover their costs against the defendants; the plaintiffs waiving the account prayed for in the bill, the Court does not order such account."

[*Folsom v. Marsh*, 2 Story, C. C. 100.]

*(d.) Inquiry as to infringement.*

*(By consent.)* It is ordered that it be referred to &c., to inquire and report, whether the copper-plate published by the defendant, entitled &c., is of the same size and scale, and has the same marginal notes and directions or instructions, and is in all respects the same as the first plate published by the plaintiff, entitled &c., save an affected variation in the historical and geographical anecdotes in the margin &c.<sup>1</sup> 2 Seton Dec. (Eng. ed. 1862) 905.

## 6. PATENTS.

*(a.) Staying infringing patent as to bricks.*

The Court doth order that an injunction be awarded to restrain the defendant H., his agents, servants, and workmen, from making or vending any perforated bricks upon the principle of the inventions in the plaintiff's bill mentioned, belonging to the plaintiffs or either of them, during the remainder of the respective terms of the patents in the plaintiff's bill mentioned, and from counterfeiting, imitating, or resembling the same inventions, or either of them, or making any addition thereto or subtraction therefrom; until &c. *Beart v. Hewitt*, (1853) 2 Seton Dec. (Eng. ed. 1862) 909.

*(b.) Staying infringement as to machinery.<sup>2</sup>*

This Court doth order, that an injunction be awarded to restrain defendants W. &c., their servants, agents, and workmen, during the continuance of the letters-patent firstly and secondly in the plaintiff's bill stated and set forth, and whilst the same may be in force, from manufacturing, selling, using, offering or exposing for sale, or making any other profitable use or disposition of any wool-combing machines, or parts of wool-combing machines, made, constructed, contrived or arranged so as to comb wool by machinery, apparatus, arrangements, operations, contrivances, means or appliances, similar to the machinery, apparatus, contrivances, arrangements, means or appliances, the subject of the plaintiff's inventions, or either of them, or differing therefrom colorably, or by mere mechanical equivalents.

<sup>1</sup> For other forms in like cases, see *Clement v. Maddick*, 1 Gif. 101; *Pope v. Curl*, 1 Atk. 342; *Roade v. Lacy*, 1 J. & H. 524 and note; *Mayhew v. Maxwell*, 1 J. & H. 312; *Jarrold v. Houlston*, 3 K. & J. 722; *Delfe v. Delamotte*, 3 K. & J. 584; 2 Seton Dec. (Eng. ed. 1862) 905, 906.

<sup>2</sup> For reference to other cases in which are forms of injunction to restrain infringement of patents, see 2 Seton Dec. (Eng. ed. 1862) 909, 910; *Caldwell v. Vanolis*, 1 Hare, 431; *Patent Type Co. v. Walter*, Joh. 732.

and generally from counterfeiting, imitating, or resembling plaintiff's inventions, or either of them, or any part thereof, or making any addition thereto or subtraction therefrom, and parting with the custody of any wool-combing machines, or parts of machines, whether finished or in progress, now in their or either of their possession, which have been so made, constructed, contrived, or arranged; until &c. *Lister v. Wood*, (1858) 2 Seton Dec. (Eng. ed. 1862) 909.

(c.) *Motion to stand over, with leave to bring action and direction for inspection; defendant keeping an account.*

Defendants undertaking to keep an account of all mohair cloths, and other textile fabrics, finished by or for them, or any or either of them, in the manner in the plaintiffs' bill complained of, it is ordered that this motion stand over, with liberty to the plaintiffs to bring such action at law, in &c., against the defendants, as they may be advised; And it is ordered, that the defendants permit and suffer the plaintiffs, with such two viewers as the plaintiff shall think proper, to go over all or any of the manufactories of the said defendants, or of any or either of them, and inspect the machinery set up there for finishing mohair cloth, or other textile fabrics, and to observe the method or methods of finishing such mohair cloth, or other textile fabrics, by the said defendants, or any or either of them, for which purpose the said defendants are to put their machinery to work in the presence of the said plaintiffs and such viewers, and to afford every facility to them to ascertain the process of finishing cloth by means of such machinery and every part thereof, it being the object and intention of this Court to enable the plaintiffs to give such evidence to the Court and jury, on the trial of such action, as will enable them to make out, if the fact be so, the infringement complained of by their said bill. Liberty to apply. *Beardsell v. Schwann*, (1857) 2 Seton Dec. (Eng. ed. 1862) 910.

(d.) *Staying infringement, after verdict establishing patent.*

The Court doth order, that an injunction be awarded to restrain the defendants D. &c., their agents, servants, and workmen, during the continuance of the letters-patent in the plaintiffs' bill mentioned, and whilst the same may be in force, from using or employing, without the leave or license of the plaintiffs, in or for the purpose of the folding of the flaps of envelopes in succession one after the other, or for the gumming or cementing together the edges of such flaps and causing such edges to adhere together whilst in course of being folded, any machines similar to the machine which was produced for inspection at their factory on the — day of —, as in the plaintiffs' bill stated, or any machinery, mechanism, or mechanical contrivance made or arranged, according to the plaintiffs' said

patent inventions, or differing therefrom only colorably or by the substitution of mere mechanical equivalents for the same, and from folding the flaps of envelopes in succession one after the other, and gumming or cementing the edges of such flaps and causing the same to adhere together whilst such flaps are in course of folding by means of any such machine, machinery, mechanism, or mechanical contrivances, and from selling or offering for sale any envelopes which have been heretofore manufactured by the said defendants, their agents, servants, or workmen, and in the manufacture whereof any such machine, machinery, or mechanical contrivances hath, or have, been used or employed for the purpose of folding the flaps of such envelopes in succession, or for gumming or cementing, or causing the same to adhere together whilst such flaps have been in course of being folded, and generally from making, using, exercising, putting in practice, or vending plaintiffs' patent inventions, or any or either of them, without their license or authority, and from or in any wise counterfeiting, imitating, or resembling the same; until &c. *De la Rue v. Dickinson*, (1857) 2 Scam Dec. (Eng. ed. 1862) 911.

(c.) *Declaration of validity of patent; infringement; account; perpetual injunction.*

R. W., H. S., and D. B. W.,

v.

H. B., H. B., Jr., and H. F.

This cause having been brought to a final hearing upon the pleadings and proofs, and counsel for the respective parties having been heard, and the same having been duly considered by the Court: It is found and hereby ordered, adjudged, and decreed, [declared] that the letters-patent, No. 12,643 granted unto the said R. W., April 3, 1855, is a good and valid patent, being the patent referred to in the plaintiffs' bill, and that the said R. W. was the original and first inventor of the improvement described and claimed in the said patent; and also, that the said defendants have infringed upon the said patent, and upon the exclusive rights of the plaintiffs under the same.

And it is further ordered, adjudged, and decreed, that the plaintiffs do recover of the defendants the profits, gains, and advantages which the said defendants, or any or either of them, have received or made, or which have arisen or accrued to them, or either of them, from said infringement of the said patents, by the manufacture, use, or sale of the improvements described and secured by the said letters-patent at any and at all times since the 1st day of November, 1856.

And it is further ordered, adjudged, and decreed, that the said plaintiffs do recover of the defendants their costs and charges and disbursements in this suit, to be taxed.

And it is further ordered, adjudged, and decreed, that it be referred to K. G. W., one of the Masters of this Court, residing in the city of N. Y., to ascertain, take, and state, and report to the Court, an account of the gains, profits, and advantages which the said defendants, or either of them, have received, or which have arisen or accrued to them, or either of them, from infringing the said exclusive rights of the said plaintiffs by the manufacture, use, and sale of the said improvements patented in said letters-patent, since the said 17th day of November, 1856.

And it is further ordered, adjudged, and decreed, that the plaintiffs, on such accounting, have the right to cause an examination of said defendants, and each of them, *ore tenus*, or otherwise, and also the production of their books, vouchers, and documents of each of them, and that the said defendants attend for such purpose before said Master, from time to time, as said Master shall direct.

And it is also further ordered, adjudged, and decreed, that a perpetual injunction be issued in this suit against the said defendants, according to the prayer of the bill.

K. G. W., *Clerk.*

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## 7. TRADE-MARKS.

### (a.) *Staying using trade-marks as to tools or cutlery.*

This Court doth order that an injunction be awarded to restrain the defendants W. &c., respectively, (and every and each of them,) and the respective servants, agents, and workmen of the said defendants, (and of every and each of them,) from stamping, cutting, or engraving, or causing or permitting to be stamped, cut, or engraved, upon any tools or other articles manufactured for or bought, procured, or sold by them, the words, "Collins & Co., Hartford, Cast Steel, Warranted," or any other words similar to, or only colorably differing from such words, or any words or marks so contrived as to represent or lead to the belief that the said tools or other articles were the manufacture of the said Collins & Co.; And from affixing or causing to be affixed to any tools or other articles manufactured for or bought, procured, or sold by them, or otherwise using or employing, or causing or permitting to be used or employed, any labels containing the words &c. (*as above*), or any label or labels similar to or only colorably differing from the labels made or used by the said company, as in the plaintiff's bill mentioned, or so contrived and prepared as to represent or lead to the belief that the tools or other articles manufactured or sold by the defendants were the manufacture of the said company; And also from selling, exporting, consigning, or otherwise disposing of any tools or other articles having or bearing thereon any such words, marks, or

labels, as in the said bill mentioned, or any other words, marks, or labels only colorably differing from the said marks and labels of the said company; until &c. *Collins v. Walker*, (1857) 2 Seton Dec. (Eng. ed. 1862) 914.

(b.) *Perpetual injunction on the use of another's trade-marks.*

This cause came on to be heard at this term upon the bill, answer, and proofs in the cause, and was argued by counsel on behalf of the plaintiffs, no counsel appearing for the defendant, [the counsel who had previously appeared for him] having voluntarily withdrawn from the cause.

On consideration whereof, it is ordered, adjudged, and decreed by the Court, that a perpetual injunction be granted in the premises according to the prayer of the bill, and that the plaintiffs do recover costs against the defendant, to be taxed by the clerk under the direction of the Court.

[*Taylor v. Carpenter*, 3 Story C. C. 458.]

(c.) *Perpetual injunction against shipping goods with plaintiff's trade-marks, on motion for decree.*

This Court doth order that "a perpetual injunction be awarded to restrain the defendants J. and N., and each of them, their servants and agents, from affixing or applying, or causing to be affixed or applied to any goods manufactured, sold, shipped, or supplied by them, any mark, and especially the figure of a lion &c. so contrived as by colorable imitation or otherwise to represent the goods manufactured, sold, shipped, or supplied by the defendants as being standard Spanish Stripes, &c., or other woollen goods manufactured or shipped by or for the plaintiffs, and from selling, exporting, or shipping, or causing or allowing to be shipped or exported, or otherwise disposing of, any goods manufactured by or for the defendants, in which any such mark has been or shall be affixed or applied." Defendants to pay plaintiffs' costs of suit to be taxed &c. *Henderson v. Jones*, (1861) 2 Seton Dec. (Eng. ed. 1862) 915.<sup>1</sup>

<sup>1</sup> For other cases in which are found forms of injunctions to restrain use of trade-marks, see *Edelsten v. Vick*, 11 Hare, 86; *Farina v. Silvertock*, 1 K. & J. 509; S. C. 6 D. M. G. 214, note; *Gant v. Aleploglu*, 6 Beav. 69 n.; *Knott v. Morgan*, 2 Kee. 238; *Morison v. Moat*, 9 Hare, 241.

## 8. PARTNERSHIP.

*(a.) Order for injunction against acting as partner.*

The Court doth order that an injunction be awarded against the defendant B., his agents and servants, from entering into any contract or contracts, and from accepting, drawing, indorsing, or negotiating any bills or bill of exchange, notes or note, or written securities or security, in the name of the partnership firm of D. & B.; and from contracting any debts or debt, and buying and selling any goods, and from making or entering into any verbal or written promise, agreement, or undertaking, and from doing or causing to be done any acts or act, in the name or on the credit of the said partnership firm, or whereby the said partnership firm can, or may, in any manner become, or be made liable to, or for the payment of, any sums or sum of money, or for the performance of any contract, promise, or undertaking; until &c. 2 Seton Dec. (Eng. ed. 1862) 917.

*(b.) Injunction on dissolution of partnership.*

This Court doth order that an injunction be awarded to restrain the defendant and his (servants and) agents from intermeddling with the partnership assets, and from signing or using the name or style of the firm of H. & D., or from trading, or dealing, in or under that name or style; until &c. Directions for receiver. 2 Seton Dec. (Eng. ed. 1862) 917.

## 9. NEGOTIATING SECURITIES.

This Court doth order that an injunction be awarded to restrain the defendants from parting with, out of the custody of them, or any of them, or indorsing, assigning, or negotiating the promissory note, dated &c., in the plaintiff's bill (and affidavit) mentioned; until &c.

## 10. TRANSFERS.

The Court doth order, that an injunction be awarded to restrain the defendant A. from transferring any stock standing in the name of B., the testator in &c., named, or in the name of the said A., as the executor of the said B., or any part thereof, and from receiving the dividends and interest due or to accrue due thereon; and also to restrain the President, Directors & Co., of the — bank, from permitting the said defendant A. to transfer

such stock, or receive such dividends and interest ; until &c. For like order as to any stock, with injunction against the bank, see *White v. White*, 2 Seton Dec. (Eng. ed. 1862) 920.

# 11. RAILWAYS.

## (a.) *Railway Co. enjoined from continuing in possession or entering a land.*

This Court doth order that an injunction be awarded against the defendants, the L. V. Ry. Co., to restrain the defendants, their contractor, servants, agents, and workmen, from continuing in possession of the piece of land thirdly described, in the indenture of lease in the plaintiffs' bill mentioned, and whereupon the defendants have entered, or any part thereof; and from entering upon, taking, or using the said piece of land, or any part thereof, without the consent of the plaintiffs first had and obtained; until &c. 2 Seton Dec. (Eng. ed. 1862) 928.

## (b.) *Declaration of right to use railway ; rents, damage ; compensation for occupying land not authorized to be taken ; injunction.*

Declaration of plaintiff's right to the use of the railway in the pleadings mentioned for the purpose of carrying coal &c., upon payment of an ascertained annual rent to the land-owner. — And it is ordered that it be referred to &c., to take an account of what is due from the plaintiffs in respect of such rent ; what reported to be due to be paid within 21 days from date of report. — And it is also ordered that the said Master do inquire " what is the amount of damage that has been sustained by the plaintiffs by reason of the defendant having pulled up the rails and impeded and prevented the use of the said railway, as in the bill mentioned ; And that he also inquire, what is the amount of compensation to be paid to the defendant, for the use and occupation of the land whereon has been erected the engine-house, in &c., mentioned, since the — day of —." Injunction to stay defendant preventing plaintiffs replacing the rails and restoring the railway, and from using it as heretofore, so as not to injure defendant's land, as long as plaintiff is entitled to use the railway ; defendant to pay plaintiffs' costs of suit to this time. *Mold v. Wheatcroft*, (1859) 2 Seton Dec. (Eng. ed. 1862) 929.

## 12. MANDATORY.

*Enjoining the return of documents.*

This Court doth order that an injunction be awarded to restrain the defendant H. from detaining and keeping possession of the books, deeds, documents, and papers removed as mentioned in the plaintiffs' affidavit by the said defendant, or by his order, from the chambers occupied by the plaintiffs, for retaining which no written authority has been produced by the defendant, as mentioned in the plaintiffs' affidavit of &c., or any of them, except the five boxes not claimed by the plaintiffs, and from permitting the same or any or either of them, except the said five boxes, to remain away from the office of the plaintiffs, or from parting with the books &c., removed by the defendant, or by his order, from the chambers occupied by the plaintiffs, or any of them, except the said five boxes, to any person or persons other than the plaintiffs, and from destroying, mutilating, or obliterating the said books &c., or any or either of them, except as aforesaid, or any parts or part thereof respectively, or any entries or entry therein, or from making any alteration, interlineation, or erasure in the same, or any of them; until &c. 2 Seton Dec. (Eng. ed. 1862) 936.

## 13. GENERAL.

*Restraining a town and its officers from paying out money for unauthorized purposes.*

And the inhabitants of the said town of B., and all their officers and servants, are hereby enjoined and commanded that they apply the said money to the payment of the legal debts and liabilities of the town, and to no other purpose; and that they shall not at any time, by their vote, or by taxation, or by pledge of the credit of the town, or by the use of its funds, or in any other manner, make any provision, directly or indirectly, for the payment of the money mentioned in the said claims of J. H. and S. O. M., and of E. B. G., set forth in the bill, nor any part thereof, or for the indemnity, in whole or in part, of any person or persons by whom said sums of money have been paid or may hereafter be paid, in whole or in part, or of any persons who may be interested in the same, or in any way directly or indirectly, to evade the true intent and effect of this decree.

[Frost v. Belmont, 6 Allen, 152.]

14. WRIT OF INJUNCTION RESTRAINING ONE HOLDING PROPERTY OF  
A FOREIGN DEBTOR WHICH COULD NOT BE ATTACHED AT LAW  
FROM TRANSFERRING OR DISPOSING OF IT.

Commonwealth of Massachusetts.

S——, ss.

To H. E., of B., in said County, his servants, agents, attorneys,  
and counsellors, and each and every of them.

Greeting:

Whereas it has been represented unto the Justices of our Supreme Judicial Court, now holden at Boston, within and for said county, sitting as a Court of Chancery, that the Columbia Insurance Company, of Columbia, South Carolina, is a foreign insurance company, and that said company is largely indebted to D. S., of N., in the county of E., as in said D. S.'s bill of complaint, this day filed in our said Court, is alleged, and that the said company have no property in this Commonwealth which can be come at to be attached or taken on execution, and that you the said H. E. have a large amount of the property of the said company now in your possession; consisting chiefly of valuable promissory notes belonging to said company,

We, therefore, in consideration of the premises, do strictly enjoin and command you the said H. E., and all and every the persons before named, from passing any promissory notes or other property now in your possession, or under your control, belonging to the said Columbia Insurance Company, into the possession of any person whatever, and especially not into the possession or control of the said company, or any officer or agent of the same; but to keep and retain the same in your own hands, until the further order of our said Court or some one of the Justices thereof.

Witness, L. S., Esquire, at B., this —— day of ——

G. C. W., Clerk

15. DISSOLVING OR CONTINUING.

(a.) *Injunction dissolved or continued on motion.*

Upon motion &c., by counsel for the defendant [*If plaintiff appears, and upon hearing counsel for the plaintiff*], and upon reading the order dated &c. [*enter affidavits and answers, if any, and if plaintiff does not appear*]. This Court doth order, that the injunction awarded by the said order dated &c. do stand dissolved [*or be continued until the hearing of this cause, or until the further order of this Court*].

(b.) *Continued at the hearing.*

And it is ordered that the injunction awarded against the defendant H. by the order dated &c., be continued until further order.

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16. PERPETUAL AT HEARING.

*Decree making injunction perpetual as to copyright.*

This Court doth order that the injunction granted (awarded) in this cause to restrain the defendants, their servants, agents, or workmen, from printing, publishing, or vending a book, comedy, or farce, called &c., or any part thereof, be made perpetual; And the plaintiff (by his counsel) waiving the account prayed by the bill, the Court doth not think fit to direct any account. Defendants to pay plaintiff's costs. 2 Seton Dec. (Eng. ed. 1862) 944.

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17. BREACH OF INJUNCTION.

(a.) *Committal for breach of injunction.*

Whereas the plaintiff on the — day of —, obtained an injunction [*Recite injunction; or, if writ not issued and served, whereas by an order dated &c. Recite order for injunction*]. Now, upon motion &c., and upon [*if the defendant appears, hearing counsel for the defendant and*] reading [*if the defendant does not appear, an affidavit of &c., filed &c., of notice of this motion to the defendant*] the said order, the affidavit of &c. [*enter evidence;*] And this Court, being of opinion, upon consideration of the facts disclosed by the said affidavit of &c. [*or the said affidavits*] that the said defendant has been guilty of a contempt of this Court by a breach of the said injunction, doth order that the said defendant A. do stand committed to the — prison for his said contempt. 2 Seton Dec. (Eng. ed. 1862) 945.

(b.) *Sequestration.*

Whereas by an order &c., the defendants, the Manchester &c., by their counsel, undertaking &c. [*Recital of order*]; Now upon motion this day made &c., who alleged that it appears by the affidavit of &c., that the defendants have not complied with their said undertaking, by permitting the plaintiffs to use their railway and conveniences connected therewith from C. to S., and upon hearing counsel for the defendants, and reading the said affidavits, and the affidavit of &c.; And this Court being of opinion, that

the defendants, the Manchester &c., have committed (been guilty of) a contempt of this Court in not complying with their undertaking, to permit the plaintiffs to use their railway and conveniences connected therewith from C. to S., in the said order dated &c., mentioned, doth order, that a commission of sequestration do issue, directed to certain commissioners to be therein named, to sequester the personal estate, and the rents, issues, and profits of the real estates of the said defendants, the Manchester &c., until the further order of this Court. 2 Seton Dec. (Eng. ed. 1862) 946. See *Att'y-Gen. v. G. N. Ry.*, 4 D. & S. 89; *Shrews. & B. Ry. v. Stour. Val. Ry.*, 2 D. M. G. 866.

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18. NE EXEAT REGNO.

(a.) *Order for writ to issue.*

Upon motion &c., and upon reading an affidavit of &c., filed &c. [*enter evidence, and if before appearance*, and the clerk's certificate of the filing of the plaintiff's bill in this cause on the — day of —]; And the plaintiff by his counsel undertaking &c. (*as to damages*); This Court doth order, that a writ [*or one or more writ or writs*] of *ne exeat regno* do issue against the said defendant A., until this Court make another order to the contrary; And the said writ [*or writs*] is [*or are*] to be marked for security in the sum of \$ —, in words at length, and not in figures. 2 Seton Dec. (Eng. ed. 1862) 959.

(b.) *Writ discharged on defendant giving security.*

Upon appeal motion from order of &c., dismissing defendant's motion and for leave to go out of the jurisdiction for — months, he undertaking then to return.— It is ordered, that upon the defendant M. giving security to the amount of \$ —, with two sureties, such security to be approved by the Court [*or Judge, or Master*], to answer such sum as may be found due from him in this cause, the writ of *ne exeat regno* issued in this cause be discharged; And it is ordered, that the order of &c., dated &c., be also discharged, except so much thereof as ordered that the defendant M. should pay to the plaintiff his costs of that application, to be taxed &c. *Lee v. Melendez*, (1849) 2 Seton Dec. (Eng. ed. 1862) 960.

(c.) *Order for examination of defendant, as of poor debtor. (Massachusetts.)*

It is ordered by the Court, "that W. J. H., Esq., a Master in Chancery for the county of —, be, and he hereby is, appointed to take the examination of said H. (the defendant), upon the petition for his discharge from

arrest upon a writ of *ne exeat regno*, sued out by the plaintiffs in the said county of S., in the same manner and with the same effect as if he were a debtor offering to take the poor debtor's oath; to take the examination in writing upon interrogatories, and report the same to one of the Justices of this Court, as soon as may be. Due notice of the time and place of the examination to be given to the solicitor of the plaintiffs."

[*Rice v. Hale*, 5 Cush. 244.]

(d.) *Ne exeat discharged; inquiry as to damages and payment according to undertaking.*

The Court doth order, that the writ of *ne exeat regno* issued against the defendant M. pursuant to the order dated &c., and the said order, be respectively discharged with costs, including the costs of this application, such costs to be taxed &c., and paid by the plaintiffs S. &c., to the said defendant M.; And that it be referred to &c., to inquire and report what damages have been sustained by the said defendant M., by reason of the said order dated &c., having been made; And that the plaintiff S. &c., pursuant to their undertaking contained in the said order, within one month after the date of the Master's report of the result of the said inquiry, pay what shall be certified in respect of such damages to the said defendant M. Liberty to apply. *Sickell v. Raphael*, (1861) 2 Seton Dec. (Eng. ed. 1862) 960.

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## SECTION II.

### INTERPLEADER.

#### 1. STAYING PROCEEDINGS.

(a.) *Injunction on motion upon payment into Court.*

It is ordered that the plaintiffs W. and B. be at liberty to pay the sum of \$ — insured on the life of H., into the bank, with the privy &c., to the credit of this cause; And thereupon it is ordered that an injunction be awarded to restrain the defendants F. and M., his wife, from proceeding in the action at law commenced by them against the plaintiffs, as in the bill mentioned; and to restrain the said defendants from commencing or preventing any action or actions, suit or suits, or other proceedings against the plaintiffs, or either of them, to recover the money insured by the policies in the bill mentioned. — Direction for investment when paid in. 2 Seton Dec. (Eng. ed. 1862) 962.

*(b.) Same ; on undertaking as to the subject-matter.*

Plaintiffs sold resin to Ws, but retained possession at Ws' request; Ws resold to B., who before delivery became bankrupt. Actions were brought against plaintiffs by Ws, and by C. &c., B.'s assignees. Blann was assignee under trust deed for the creditors of Ws.

And the plaintiffs (by their counsel), undertaking not to part with the — tons of resin mentioned in the plaintiffs' bill, until the further order of this Court; and also undertaking to give a notice of motion that the said — tons of resin may be sold and the proceeds thereof paid into Court it is ordered that an injunction be awarded to restrain the defendants Ws and C. from prosecuting the actions at law commenced by them respectively against the plaintiffs, for or in respect of the — tons of resin in the bill mentioned, and also to restrain the said defendants, together with the defendant Blann, from commencing or prosecuting any further or other action or suit against the plaintiffs, for or in respect of the said — tons of resin: until &c. 2 Seton Dec. (Eng. ed. 1862) 962.

*(c.) Interpleader in favor of bank ; United States Circuit Court cannot join suit in State Court ; injunction on action in United States Court ; unless adverse parties elect to interplead ; in case of such election funds due paid into Court.*

This cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it appearing to the Court that the plaintiffs held the assets and funds in the bill mentioned for the true owner, without having or claiming any right or interest therein, and that they are ready and willing to deliver the same over to whomsoever may have right therein; and it appearing to the Court that the defendants E. S. and M. A. F. have heretofore filed their bill in the Court of Chancery in the State of &c., against the plaintiffs and the defendant P. R. Y., alleging the full right and title to the said funds and assets to be vested in and to belong to the said E. S. and M. A. F.; and it appearing to the Court that the plaintiffs and the said P. R. Y. entered their respective appearances in said suit in said Court of Chancery, and that said suit is still pending and undetermined; and it further appearing to the Court that after such suit was instituted the said P. R. Y. commenced in this Court, in his own name, two separate actions at law against the plaintiffs, one in tort, in which he seeks to recover the value of said funds and assets, and the other in contract, in which damages are demanded for the detention of the said assets, and that the plaintiffs have appeared in the said actions, and the same are yet pending and undetermined in this Court; It is considered by the Court that the plaintiffs are entitled to relief in this Court in equity; but, inasmuch as the suit insti-

tuted against the plaintiffs by the said E. S. and M. A. F., is prosecuted in the Court of Chancery, of the State of &c., and the proceedings before that tribunal are not within the cognizance of this Court, or subject to its control, it is considered by the Court, that so much of the prayer of the said bill as seeks an interpleader in the premises, and prays the same to be decreed by this Court against the above-named defendants, ought not to be granted, and it is, therefore, ordered that the same be denied. It is further ordered, that an injunction issue, according to the prayer of the bill, against the said P. R. Y., restraining him from further prosecuting his said actions at law, or either of them, instituted in this Court against the plaintiffs, until the final decision of the said suit pending in the Court of Chancery of the State of &c., unless the said P. Y. R. and E. S. and M. A. F. shall within twenty days from the date of this order file their stipulation in writing in this Court, electing to interplead between themselves in this Court in respect to the subject-matter aforesaid; And, in case of such interpleader between the said parties, it is ordered that the said plaintiffs thereupon pay into this Court the funds and assets aforesaid, first deducting therefrom such their costs and expenses as shall be allowed them by the Court.

## 2. DECREE IN INTERPLEADER SUIT.

### (a.) *Direction to interplead; payment of costs.*

For statement of case, see No. 1 (a) p. 2327. This Court doth order that the parties interplead; and for that purpose it is ordered that the defendants W. &c., proceed in the action of &c., brought by them against the plaintiffs (as in the bill mentioned), with liberty for the defendants C. &c., the assignees of B., to defend such action. Direction to tax the plaintiffs' costs of suit, and also of the said action, and of the action brought by the defendants C. &c., against the plaintiffs, so far as they have proceeded; and to raise and pay such costs from proceeds of sale of the resin paid into Court. Adjourn &c., until after trial. 2 Seton Dec. (Eng. ed. 1862) 964.

### (b.) *Action stayed as to policy money; inquiry who entitled.*

(*By consent.*) Plaintiff to be at liberty to retain the sum of \$—— for his costs of the action at law in the bill mentioned, and of this cause, out of the sum of \$——, the amount due upon the policy in the bill mentioned. And it is ordered that the plaintiff M., on or before &c., pay the sum of \$——, being the residue of the said sum of \$——, after such retainer, into the bank &c., to the credit of the cause. Directions to invest; injunction to stay the defendant T. from prosecuting the action at law commenced by her against the plaintiff, and to stay her and the other

defendants from commencing or prosecuting any other action against the plaintiff or the Insurance Company in respect of any money due on the policy. And it is ordered, that all further proceedings in this cause be stayed as regards the plaintiff; and as between the defendants that an inquiry be made who is entitled to the said sum of \$——. *Maeintyre v. Thomson*, (1860) 2 Seton Dec. (Eng. ed. 1862) 964.

(c.) *Interpleader declaring the persons entitled; costs to be taxed as between solicitor and client, and paid out of fund; balance to be paid over to persons entitled; bill dismissed without costs, as to other defendants.*

Supreme Judicial Court.

SUFFOLK, SS.

In Equity.

C. G. L., Executor,

v.

L. T. *et al.*

This cause coming on to be heard, it appeared that the said Israel Thorndike, the elder, by his last will directed his executors, of whom the complainant [plaintiff] is the survivor, to place the sum of twenty thousand dollars in the office of the Massachusetts Hospital Life Insurance Company, in trust, to receive the income, and pay it annually to his son Andrew Thorndike, during his life, and at his decease, to take up the sum and pay it to the heirs-at-law of the said Andrew; that said deposit was made and the income paid to the said Andrew during his life; that upon his decease Israel Thorndike, a brother of the said Andrew, brought his action at law against the said executors, claiming one sixth part of said fund as one of the heirs-at-law of the said Andrew; that, thereupon, the said complainant [plaintiff] filed his bill and amended bills in equity against the said Israel and other persons, who would be the heirs-at-law of the said Andrew, if he had died unmarried and without lawful issue; and also against Katharina Bayerl Thorndike, claiming to be the lawful widow of the said Andrew; and against Andreas Thorndike and Anna Loring Thorndike, infants, claiming to be the lawful issue and heirs-at-law of the said Andrew, praying that the said Israel might be enjoined from prosecuting the said suit at law, and that the several parties might interplead and present their respective claims for the consideration and determination of the Court; and thereupon the said parties did appear, by their respective counsel and guardians, and proofs being taken and read, and upon arguments of counsel, it was considered, and is now adjudged and decreed [declared], that the said Andreas Thorndike and Anna Loring Thorndike are both children of the said Andrew, begotten upon the body of the said Katharina, before marriage; that

afterwards the said Andrew was duly and lawfully married to the said Katharina, lived with her as his lawful wife, and openly and publicly acknowledged the said Andreas and Anna Loring to be his children and heirs-at-law; that by reason thereof they are entitled, under the will of the said Israel Thorndike the elder, to the said sum of money to be divided between them in equal shares; and that the said Katharina is not entitled to any part thereof; and that the other defendants are not entitled.

And it appearing to the Court, by the statement of the said complainant [plaintiff], that he holds the sum of twenty thousand seven hundred forty-five dollars and twenty-seven cents, subject to the order and direction of the Court: It is further ordered and decreed, that he do pay to the solicitors, F. C. L., C. W. L., and A. D., their costs of counsel fees, to be taxed as between solicitor and client, and that the residue thereof be paid one half part to J. G., guardian of the said Andreas Thorndike, and one half part to W. I. B., guardian of the said Anna Loring Thorndike; and that the bill be dismissed as to the other defendants, without costs.

By the order of P. M., Esq.,

One of the Justices of the said Court.

G. C. W., *Clerk.*

March 30, 1863.

[Loring v. Thorndike, 5 Allen, 257.]

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### SECTION III.

#### 1. ISSUES.

##### (a) *Order for an issue.*<sup>1</sup>

“Inasmuch as it does not satisfactorily appear to the Court, that any agreement has been made by and between the parties, as to the amount of such damages and compensation [*in dispute*], to the end that the same may be satisfactorily ascertained, it is further ordered, adjudged, and decreed, that an issue be made up between the parties, to ascertain, by the verdict of a jury &c., the amount of such damages and compensation.” Directions as to the Court and term; form of the issue; restrictions on plaintiff in the

<sup>1</sup> See directions for an issue on the question of violation of copyright in *Emerson v. Davies*, 3 Story C. C. 798. It is settled in New Hampshire, that a party to a bill in equity has a constitutional right to require a trial by jury of a contested matter of fact, if he asserts that right at a proper stage of the cause. *Hoitt v. Burleigh*, 18 N. Hamp. 389. See ante, Vol. II. p. 1090, note, 1085 et seq. The proper stage for this seems to be after replication and before taking testimony. *Hoitt v. Burleigh*, *supra*. But the Court, for sufficient reasons, may cause issues to be framed after the testimony has been taken. *Hoitt v. Burleigh*, *supra*. See ante, Vol. II. p. 1085 et seq., and notes.

trial ; admissions to be made by defendant ; allowances by the jury ; "and that all further directions be reserved until the said issue shall be tried, and the postea returned to this Court." *Phillips v. Thompson*, reported 1 John Ch. 152.

(b.) *Same.*

E——, ss.

S. J. C.

In Equity.

J. H., Ex'r v. D. P.

D. P. v. J. H., Ex'r.

And now, after hearing the parties, it is ordered that issues be framed in the above cases for the purpose of submitting to a jury the following questions :

1. What shares or proportions did G. H. [the testator] during his lifetime own in the lot or parcel of land first set out and described in the bill of said J. H., executor?

2. Did G. H. [the testator] during his lifetime own any share or part in the lot of land secondly set out and described in the bill of said J. H., executor, and if any, what share or part did he so own?

A separate issue is to be framed for the purpose of presenting each of the above questions ; in which the said executor is to aver the share or proportion which he claims that his testator owned in each of said lots or parcels of land ; and the said D. P. is to traverse said averments ; but in the issue embracing the inquiry as to the title to the first lot or parcel, described in the bill of said executor, the said D. P. will not be permitted to traverse the fact of title in said testator to some portions of said lot or parcel.<sup>1</sup>

The above issues are to be framed by the counsel and submitted to the Court for approval, on or before the —— Tuesday of —— next, on which day a further order will be passed for the trial thereof. [*Hodges v. Pargree*, Essex Co., Mass., Jan'y 18, 1860, G. T. B., J. S. J. C.]

(c.) *Same.*

P——, ss.

S. J. C.

In Equity.

J. A. v. C. L.

And now, on motion of the plaintiff, and after hearing the parties, the Court doth think fit and proper, and doth order, that the matters of fraud alleged in the bill, and in dispute in this cause, be tried and determined by a jury on the following issue to be joined, viz. &c.

<sup>1</sup> See ante, Vol. II. p. 1097 and note. For form of issue as to the existence of a partnership, see *Drope v. Miller*, 1 Hempstead, 49, 50.

*(d.) Same.*

"And now, upon motion of the parties and due examination of the pleadings, the Court doth think fit and proper [and doth order] that the matters in dispute in this cause be tried and determined by a jury upon the following issues to be joined, viz." "And it is further ordered, that the said issues stand for trial at the — next to be held in the county of —, on the &c., and that upon the trial of said issues, the answer of the defendant and the plaintiff's bill, and the depositions now on file may be read, and that either party may offer any competent evidence under the directions of the presiding Judge. And all further directions are reserved until after the trial of said issue."

*(e.) Issue devisavit vel non. Modern Form. [English.]*

And this Court being desirous of having the following question of fact decided by a jury, that is to say: "Whether the paper writing dated &c., in the pleadings mentioned, purporting to be the will of C., of &c., is or is not the last will and testament of the said C. It is ordered that an issue [or issues]" &c.

*(f.) Issues as to clause in will.*

It is ordered that the parties proceed to a trial at law, at the — next to be holden &c., on the following issues: 1. Whether H., late of &c., deceased, did, in and by a certain paper writing, dated &c., purporting to be a codicil to the last will and testament of the said H., devise in manner and form following, that is to say &c. [*stating part not disputed*]; 2. Whether the said H., having in and by his will, dated &c., from and after &c., devised &c., did by his said codicil devise in manner and form following, that is to say &c. [*stating part disputed*]." Defendant H. to be plaintiff at law &c.

*(g.) As to validity of bond.*

This Court being desirous of having the following questions of fact decided by a jury, that is to say: 1. Whether the bond and warrant of attorney was obtained from the plaintiff by means of any fraudulent (or unfair) representations by the obligees, or any of them; 2. Whether the same was obtained by any untrue representation; 3. Whether the same was obtained by any fraudulent (or unfair) concealment or suppression by the obligees, or either of them; 4. Whether the bond &c., was given to secure any debt or liability, other than the whole or part of the balance due from P. to the firm in the pleadings mentioned. *Parker v. Morrell*, 2 Ph. 453; 2 Seton Dec. (Eng. ed. 1862) 985. "Unfair" was objected to by the L. C.

*(h.) As to sanity, and validity of deed ; fraud.*

1. Whether M., in &c., named, at the time of the execution of the indentures dated &c., in &c., mentioned, was of sound mind, understanding, and capacity to execute the said deeds ; 2. Whether the said deeds were obtained from the said M. by fraud or imposition.<sup>1</sup>

*(i.) Issue as to damages.*

For issue in injunction suit, "Whether the plaintiffs, to the damage or injury of the defendant, prevented the defendant from completing his contract." Plaintiffs to admit that they did so prevent, and employ their own workmen to complete. 2 Seton Dec. (Eng. ed. 1862) 987.

*(j.) Issues as to right of way.*

For issues : "1. As to right of way through a place called 'George yard' ; 2. If there be any such right, whether it extends over the whole ; 3. If not, what is the extent, length, breadth, and direction of it ; 4. Whether any such right has been obstructed or disturbed by the defendants, or any of them, and if so, in what manner and to what extent ; 5. Whether there is any public right (other than a right of way) over the whole ; 6. Whether such right, if any, has been obstructed or disturbed by the defendants &c." Direction for special circumstances to be indorsed on the postea. 2 Seton Dec. (Eng. ed. 1862) 988.

*(k.) Directions after issues awarded. (N. Hamp.)*

"The plaintiff in this case having, on motion, obtained an award of issues to be tried by the jury, which are already framed and settled, and filed in the cause, it is ordered, that said issues be sent to the trial term of this Court, in this county, for trial by the jury, the verdict thereon to be certified to the law term of this Court. And it is further ordered, that the plaintiff here shall be regarded as the plaintiff in the trial of these issues, and that the parties upon the trial may read the bill and answers, and any evidence legally taken to be used on the hearing in Chancery, unless in cases where the attendance of any of the witnesses is actually procured ; and also may offer such other and further evidence, including the testimony of the parties, as in law would be competent on the trial of such issues." [Clark v. Congregational Society, 44 N. Hamp. 382, 383.]

<sup>1</sup> For form of order for issue to try a question of lunacy, see *Matter of Wendell*, 1 John. Ch. 603.

*(l.) Form of verdict indorsed on record. [English Form.]*

Afterwards on the — and — days of Jan., 1860, and on this day (before &c.), came the parties within named, by their solicitors and a jury of the county of Middlesex being summoned also came, who being sworn to try the question between the parties upon their oath say: "That the defendant B. did make or enter into, or give authority to make or enter into, the alleged agreement in the pleadings mentioned, dated &c." *Morrison v. Barrow*, (1860) 2 Seton Dec. (Eng. ed. 1862) 971.

*(m.) Another Form. (Mass.)*

"The jury find that the said O. M. F. did sign, execute, and deliver the agreement of compromise of which a copy is annexed to the plaintiff's bill marked (B.). And the jury further find that the signature of the said O. M. F. to the aforesaid agreement of compromise was not procured, brought about and effected by fraud, imposition, and false representations on the part of the said F. L. and wife, and their agents."<sup>1</sup> [*Leach and wife v. Fobes*, Plymouth Co., Mass., 1858.]

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## 2. ORDER FOR NEW TRIAL.

*(a.) Modern Form.*

It is ordered that the parties proceed to a new trial of the issue directed in this cause by the order dated &c., at the next — &c., to be holden &c., in the manner directed by the said order. *Short v. Macaulay*, (1857) 2 Seton Dec. (Eng. ed. 1862) 990.

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## 3. ORDER ON EQUITY RESERVED AFTER TRIAL OF ISSUE.

This cause coming on (the — day of —, and) this day to be heard and debated before this Court &c., in the presence of counsel learned for &c., upon the equity reserved by the order dated &c., the parties having, pursuant to the said order, proceeded to trial of the issue [*or several issues or question or questions of fact*] thereby directed, before the Court of &c., at the sittings &c., where the jury found &c. [*state from the postea*], upon opening and debate of the matter, and hearing the said order and the postea [*enter any other evidence*] read, and what was alleged &c. This Court &c., doth &c.

<sup>1</sup> This verdict was signed by each of the jury.

#### 4. VARIOUS ORDERS ON THE EQUITY RESERVED.

##### (a.) *After issue as to will in administration suit; costs.*

Directions to establish will, administer estate, and tax costs of suit to all parties as between solicitor and client. "And in like manner to tax the several parties to the issues directed by the decree made in this cause, their costs of such issues, and incident thereto." Plaintiffs to retain and pay costs out of personal estate, and be allowed them in account. Usual directions.

##### (b.) *After issue as to clause in will.*

This Court doth declare, that it appears, by the finding of the jury, that the part of the codicil of the testator H., whereby he expressed himself as follows &c., does not constitute the will of the testator; And that the part of the codicil of the testator, whereby he expressed himself as follows &c., doth constitute the will of the testator; and that one part of the said codicil constituting, and another part thereof not constituting, the will of the testator, this Court cannot order the same to be given up; but it being consonant to equity that the parties should stand in such a situation as if the said codicil could be delivered up, the Court doth declare, that so much of the said codicil as does not constitute the will of the testator is void, and that the devise to the heirs of the body of the testator, contained in his said codicil, ought not to take effect; And doth decree the same accordingly; And it is ordered that the defendant S. H. be restrained from setting up any title at law to the several estates so devised to the heirs of the body of the testator, contained in the said codicil, and in question in these causes. 2 Seton Dec. (Eng. ed. 1862) 993, 994.

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### SECTION IV.

#### RECEIVERS.

##### 1. APPOINTMENT OF RECEIVERS.

##### (a.) *Order for receiver of real and personal estate.*

Let a proper person be appointed to receive [or let A., of &c., upon his giving security, be appointed to receive] the rents and profits of the real [freehold and (or) leasehold] estates. [If so, and to collect and get in the outstanding personal estate] of B., the testator [or intestate], in the bill [or pleadings] named [or the rents and profits of the real &c., estates con-

prised in the indenture dated &c., in the bill &c., mentioned]; And the tenants of the said real [freehold and (or) leasehold] estates are to attorn and pay their rents in arrear and growing rents to such receiver; (And let the defendants C. and D., the executors of the will of the testator [or administrators of the effects of the intestate], deliver over to such receiver, all securities in their hands for such outstanding personal estate, together with all books and papers relating thereto); And let such receiver from time to time pass his accounts, and pay the balances which shall be certified to be due from him into &c., to the credit of this cause; And let such balances, when so paid in, be laid out &c. 2 Seton Dec. (Eng. ed. 1862) 1002.

*(b.) Receiver to give sheriff statement of property he claims.*

Let P., the receiver appointed in this cause, within (seven) days after notice hereof, deliver to the sheriff of S. a statement in writing, specifying what part of the goods and chattels now in the possession of the said sheriff the said receiver claims, as the property of K., the testator in &c., named; And let the sheriff withdraw from the possession of such parts of said goods and chattels as the receiver shall so specify. (1856) 2 Seton Dec. (Eng. ed. 1862) 1002.

*(c.) Separate accounts of rents and personalty; investment.*

And let such receiver keep separate accounts of the said rents and profits, and of the said personal estate, and from time to time pass his accounts, and pay the respective balances which shall be certified to be due from him into the &c., to separate accounts to be entitled &c.; And let such balances when &c., be laid out &c. 2 Seton Dec. (Eng. ed. 1862) 1002.

*(d.) Receiver continued at the hearing.*

Let the receiver appointed in this cause pursuant to [or by] the order dated &c., be continued; And let him (keep down the interest on the mortgages therein mentioned and) pass his accounts and pay his balances as thereby directed. (1848) 2 Seton Dec. (Eng. ed. 1862) 1003.

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## 2. MANAGEMENT OF ESTATES.

*Receiver to repair buildings.*

Let the works and repairs on the farm in the occupation of &c., at &c., mentioned in the affidavit of &c., be done and executed by &c., according to the specifications and estimates contained in the exhibits K. and L. in

the said affidavit referred to ; And let the said works and repairs be done and executed under the direction and superintendence of the defendant T., the receiver of the rents and profits of the trust estates in question in these causes ; And let, upon the said works and repairs being certified to have been properly executed, according to the said several specifications and estimates, the said receiver be at liberty to pay to the said &c., the sum of \$——, and be allowed the same on passing his accounts ; And let timber of the value of \$—— be taken off the said trust estates for the said repairs and works. *Thellusson v. Woodford*, (1855) 2 Seton Dec. (Eng. ed. 1862) 1014.

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### 3. ACCOUNT AND PAYMENT.

#### (a.) *Order for receiver to bring in account.*

“Let C., the receiver appointed in these causes, on or before the — day of — [or within — days after service of this order], leave in the Chambers of the Judge his (5th) account as such receiver, pursuant to the order dated &c., and on or before the — day of —, leave in said Chambers his (6th) account as such receiver.” Receiver to pay costs of application. *Cave v. Cave*, (1860) 2 Seton Dec. (Eng. ed. 1862) 1018.

#### (b.) *Putting recognizance in suit.*

Let the plaintiffs [and the defendant C., the trustees of the will of R. P., the testator in &c.], be at liberty to put in suit the recognizance entered into by B., the late receiver in these causes, together with D. and E., his sureties, dated &c. 2 Seton Dec. (Eng. ed. 1862) 1019.

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### 4. DISCHARGE OF RECEIVER.

#### *Discharge and payment.*

Let A., the receiver of &c., appointed by the order dated &c., be discharged ; And let him pass his final account, and pay the balance which shall be certified to be due from him into the &c., to the credit of &c. [or to (the plaintiff) B., or &c.] ; And, thereupon, let the recognizance, dated &c., entered into by the said A., together with C. & D., his sureties, be vacated.

**5. RECEIVER AND MANAGER OF TESTATOR'S BUSINESS.**

"Let a proper person be appointed to collect, get in, and receive the debts now due and outstanding, belonging to the trade or business in the pleadings mentioned, carried on by the testator, and since by the defendants M. & C., and by the defendant M., and out of the first moneys to be received to pay the debts due from the said trade or business, and to manage the same, until the sale thereof." — "And let the plaintiffs and defendants deliver over to such person all the stock in trade, goods, effects, books, and accounts belonging to the said business." — Directions to pass accounts and pay in balances. 2 Seton Dec. (Eng. ed. 1862) 1024.

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**6. RECEIVER TO PAY OFF OR KEEP DOWN CHARGES.***Annuities.*

Let the receiver appointed &c., out of the rents and profits of the real estates of H., the testator in &c., pay to the annuitants in his will named the arrears now due (to them in respect) of their several annuities, as the same shall from time to time become due, at the times and in the manner in the said will mentioned; such payments to be allowed in his accounts. *Hopkins v. Walker*, (1853) 2 Seton Dec. (Eng. ed. 1862) 1026.

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**7. RECEIVER OF PARTNERSHIP BUSINESS AND PREMISES.***(a.) Receiver and manager of partnership business.*

"Let a proper person or persons be appointed, either jointly or separately, to collect, get in, and receive the debts now due and outstanding, and other assets, property, or effects, belonging to the said partnership business of &c., at &c., and out of the first moneys to be received to pay the debts due from the said business, and to manage the same, so far as relates to any contract subsisting on the — day of —, and either of the parties is to be at liberty to propose himself as such receiver and manager to act without salary; And let the plaintiff and defendant deliver over to the person or persons so to be appointed all the stock in trade and effects of the said partnership, and also all securities in their, or either of their, hands, for such outstanding partnership estate, together with all books and papers relating thereto." — Directions that all the partnership property and effects, other than stock in trade, and the good-will of the partnership, be sold, either as a going concern, or otherwise as the court shall direct, and

either of the parties, not having the conduct of such sale, to be at liberty to bid ; Liberty to apply in chambers as to the payment of any liabilities of the partnership prior to the appointment of such receiver and manager, or receivers and managers ; Usual directions to pass accounts, and pay balances into &c., to be laid out. *Pilling v. Pilling*, (1861) 2 Seton Dec. (Eng. ed. 1862) 1031.

(b.) *The like, pending petition to annul proceedings under one petition in Insolvency, and to obtain an order to issue a warrant on another.*

E——, ss.

S. J. C.

G. T. L. et al. Pet.

v.

G. F. C. et al. Resp.

And now on this —— day of ——, after hearing the parties by their respective counsel, it is ordered, adjudged, and decreed that A. H., Esquire, of S., in the county of E., be, and he hereby is, appointed Receiver of the estates, property, moneys, debts and effects, real and personal, of the firm of W. & L., and of the estates, property, money, debts and effects, real and personal, of the firm of B. P. W. & Co., and of the estates, property, moneys, debts and effects, real and personal, of B. P. W., and of the estates, property, moneys, debts and effects, real and personal, of said G. T. L., to take charge of all and singular thereof, and collect all outstanding debts due, owing, or payable to either of said firms, or to said B. P. W., or to said G. T. L., with full power to compound for any of said debts, taking less for the whole, whenever said Receiver shall think it best for the interest of all concerned so to do, and upon such terms as said Receiver shall judge expedient, all such compromises to be sanctioned by this court before the same are carried into effect with power to prosecute and defend in the name of either of said firms, or of said B. P. W., or of said G. T. L., or in his own name as Receiver, all such suits as he shall deem expedient ; also to sell and dispose of for cash or on credit, at public auction or at private sale, all or any of the estates, debts, and effects aforesaid except moneys, if and whenever and upon such terms as said Receiver shall think for the interest of all concerned ; also with full power to submit to arbitration any dispute or controversy in regard to any debt due or claimed to be due to said firms or either of them, or to said B. P. W., or G. T. L. ; also with full power to redeem from any mortgage, pledge, lien or claim thereon any of the estates, property, debts or effects aforesaid, and to use for that purpose any funds in his hands that may belong to the firm or separate estate as the case may be, that such encumbered property may belong to.

And said Receiver has liberty to employ all such servants and agents

under him, whether members of said firm or otherwise, as he shall deem useful and expedient in the getting in, sale, collection, manufacture, or disposal of said property, estate, debts, and effects, and to pay them a proper and reasonable compensation for their services out of the proceeds thereof. And said Receiver is also empowered, if he shall think it expedient so to do, to finish and complete the manufacture of any part or portion of the property aforesaid that may be partially manufactured or in process of manufacture, and to defray the cost and expenses thereof out of the proceeds of the property, estate, debts and effects of the firm or individual to whom such partially manufactured property or property in process of manufacture belongs.

And the said B. P. W. and G. T. L. and W. R. W. and P. E. D., the Messenger, are hereby required and ordered to deliver to said Receiver, all and singular, the stock, merchandise, moneys, property, debts, and effects of said firms, or either of them, or of said W. B. P. or of said G. T. L., in the hands, possession, or control of them, or either of them, with all the books, deeds, writings, documents, vouchers, and papers relating thereto, or relating to any part or portion thereof; and each of them, the said B. P. W., G. T. L., W. R. W., and D., are restrained and enjoined from collecting any of the debts aforesaid, and from using, spending, injuring, conveying away, transferring, selling, or in any manner disposing of or incumbering any of the estates, property, debts, effects, books, deeds, writings, documents, vouchers, or papers aforesaid, except to deliver them into the hands of said Receiver. And said W. B. P. and G. T. L. and W. R. W., and each of them, are hereby required to make, execute, acknowledge, and deliver to said Receiver any and all conveyances, instruments, and transfers in writing, if any, which said Receiver shall reasonably be advised to be necessary or proper to more effectually vest in him any part of the estates, property, debts, and effects aforesaid. And said Receiver shall be entitled to retain out of the proceeds of said estates, property, debts, and effects aforesaid a reasonable compensation, to be determined by the Court for his services and expenses.

And said Receiver is required to hold all the estates, property, debts, and effects aforesaid, or the proceeds thereof, except such as shall have been disposed of pursuant to this decree, also all the books, writings, documents, vouchers, and papers aforesaid, subject to the order and direction of the Court. And said Receiver is required to file in the office of said clerk, within three months from the date of this decree, under oath, a true account of all his receipts and disbursements as such Receiver.

And either of the parties or said Receiver may apply from time to time to the Court for further direction as occasion may require. It is also ordered that a writ of injunction issue against said B. P. W., G. T. L., W. R. W., and D., conformably to this decree, and that said W. R. W. be by

said injunction also restrained and enjoined from using, spending, injuring, conveying away, transferring, selling, or in any manner disposing of or incumbering any part of his separate estate, property, debts, or effects, real or personal, or any of the books, deeds, writings, documents, vouchers, or papers relating thereto, until the further order of this Court, and except as hereafter directed or allowed by this Court.

*(c.) Order of court on request by receiver for authority to compromise notes and accounts.*

At Chambers in B., June 17, 1862.

On the foregoing petition it is ordered, that free authority be given to the Receiver in the above-entitled case to compromise and compound, and take part in payment, of all such notes, debts, and demands, due to the parties, whose estate and property are now in his hands as Receiver, on such terms and conditions as he may think expedient; the said Receiver keeping an account of the notes, debts, and demands, which may be compromised and compounded by him under this order, and making report thereof to this Court.

It is also ordered, that said Receiver pay to the messenger, appointed under the insolvent proceedings, such sum as may be due to him, for services and expenses; the same to be paid out of any funds in his hands belonging to said estate.

G. T. B.,  
Ch. Jus. Sup. J. C.

*(d.) Acceptance and approval of receiver's account.*

E——, ss. }  
S. J. C. }

G. T. L. & als., Pet.

v.

G. F. C. & als., Resp.

On the account rendered in the above cause by A. H., Esquire, the Receiver appointed therein, it is ordered, adjudged, and decreed by the Court, that said account be, and the same is, hereby accepted and approved, and that said A. H. be allowed for his services as such Receiver the sum of \$ —— out of the moneys in his hands as such receiver, and that all the goods, wares, merchandise, choses in action, property, estates, effects, moneys, deeds, documents, vouchers, writings, papers, and books of account in his hands or possession, or under his control, as such Receiver, after the retention by him out of said moneys of the sum so allowed him be delivered and passed over by him into the hands and possession of such person or

persons as shall be appointed assignees in insolvency of the joint and separate estates of B. P. W., G. T. L., and W. R. W., copartners under the firm of W. & L., and said Receiver is hereby ordered and directed to deliver and pass over the same accordingly, and make return thereof to this Court within ninety days from the date hereof. [Lancaster v. Choate, Essex Co. Mass., 1863.]

By the Court,

Attest, A. H.

D. S.	}	S. J. C.
v.		S——, ss.
The Columbia Ins. Co.		March T., 1857.
and		
H. E.		

In Equity.

(c.) *Order for the appointment of receiver, in a suit by a creditor against a foreign insurance company and their agent in Massachusetts having in his hands property which could not be come at to be attached, under the statute of Massachusetts.*

Whereas it has been made to appear to this Court by the report of G. S. H., to whom this cause was referred as Master, that there are now in the hands and possession of H. E. one of said respondent's promissory notes to the amount of \$——, accounts to the amount of \$——, and money to the amount of \$——, belonging to the said Columbia Insurance Company, over and above all claims or liens which the said H. E. has against said Company or their property in his hands. And whereas it has been made to appear that it is necessary that some fit and proper person should be appointed to receive and hold said promissory notes, accounts, and money, until the further order of this Court, with authority also to collect and compromise said notes and accounts, according to his best judgment and discretion ;

It is ordered that E. M. be, and hereby is, appointed a receiver, to receive and hold said promissory notes, accounts, and money ; and the said E. M. is hereby authorized to collect said notes and accounts, and to receive less than the full amounts due thereon whenever the full amounts in his best judgment are not collectable, subject in all cases to the approval of the Court ; and to surrender up said notes, and to give receipts for the payment of said accounts upon the payment thereof, in whole or in part as aforesaid.

And the said E. M. is to retain said funds, promissory notes, and accounts, or the proceeds thereof, and to account for and pay over the same as this Court shall hereafter order and direct.

And the said H. E. is hereby ordered and directed forthwith to deliver and pay to said E. M., receiver as aforesaid, the promissory notes, accounts, and funds aforesaid, and all books and papers in his possession or under his control relating thereto.

By order of G. T. B., Esq., one of the  
Justices of said S. J. C.

(Signed)

G. C. W., Clerk.

Oct. 24, 1857.

D. S.	}	Sup. J. Court, March T., 1857.
v.		
The Columbia Ins. Co.		
and		
H. E.		

In Equity.

(f.) *Decree discharging said H. E., in the above case, upon his paying the amount reported in his hands to the receiver.*

Whereas this cause was referred on the 27th day of April, A. D. 1857, to G. S. H., Esq., as Master, to ascertain and report what amount of funds, promissory notes, or other choses in action belonging to said Columbia Insurance Company were in the hands of H. E., the other respondent, and what liens, if any, the said H. E. had upon the same, as will more fully appear by a reference to said order; and whereas said G. S. H., in pursuance of said order, has now made his report to this Court, wherein and whereby it appears that there are now in the hands of said H. E. promissory notes belonging to said Columbia Insurance Company to the amount of \$ —, accounts to the amount of \$ —, and cash to the amount of \$ —, and that the said H. E. has a lien thereon for the following claims, namely: [*stating them*].

Making in all the sum of \$ —.

Now it is hereby ordered and decreed, that the said H. E. deliver to E. M., Esq., who has been appointed Receiver in this case, the said promissory notes and accounts, and all books, papers, and vouchers relating to the same, and also that the said H. E. pay to said Receiver the sum of \$ —, being the balance of cash in his hands, after deducting the amount of his claims and liens as aforesaid; and also, if the said H. E. is not held to pay the two said notes of \$ 120 and \$ 90, as aforesaid, then that said H. E. pay to said Receiver the additional sum of two hundred and ten dollars (\$ 210).

And after compliance by the said H. E. with each and every one of the terms of this order, it is ordered and decreed that the said H. E. be forever discharged from all liability to account to the plaintiff, or to said Columbia Insurance Company, or to any other person or corporation, for said

funds, promissory notes, or accounts as aforesaid; and that as against the said H. E. this bill be dismissed.

By order of G. T. B., Esq.,  
One of the Justices, &c.,  
G. C. W., Clerk.

Oct. 24, 1857.

(g.) *Order of reference to a master to report the amount to be allowed as compensation to receiver, and the balance remaining in his hands.*

It is ordered that this cause be referred to G. S. H., Esq., as Master, to examine the Report of E. M., Esq., Receiver, and to report what sum shall be allowed the Receiver for his services in said case, and what balance remains in his hands, subject to the further order of this Court in favor of the creditors of said Columbia Insurance Company. And the said Master is ordered to give D. S., the plaintiff, as well as said Receiver, notice of the time and place of the hearing before him.

By order of C. A. D., Esq.,  
One of the Justices, &c.  
G. C. W., Clerk.

Jan. 23, 1861.

(h.) *Order on Receiver to pay out of funds in his hands the taxable costs of suit, and the balance to the plaintiff on account of his claim.*

This cause having been referred to G. S. H., Esq., as Master, to examine the accounts of E. M., Esq., the Receiver, and to report what balance remains in his hands subject to the final decree of the Court, and it now appearing from said report that there is in the hands of said Receiver the sum of \$ —, subject to the order of this Court, and also that there are two outstanding claims in favor of said Receiver and uncollected, one of which is against one T. H. H., and the other against one J. H. P.; it is hereby ordered and decreed, that the Receiver pay from the funds in his hands the taxable costs of this case, taxed by the Court at one hundred and thirty-three dollars and  $\frac{46}{100}$  (\$ 133.46), and that the balance remaining thereafter, namely, the sum of \$ —, be paid by him to D. S., the plaintiff, on account of his claim against the said Columbia Insurance Company, on the said D. S. filing a receipt therefor with the record in this case; and that this shall stand as the final decree in this case, unless the said Receiver shall hereafter receive anything on account of the claims aforesaid, in which case he shall be at liberty to apply to the Court for further directions.

By the Court,

May 20, 1861.

G. C. W., Clerk.

## 8. RECEIVER AND MANAGER ABROAD.

*Receiver of property in Italy, with leave to appoint agent there, to litigate rights.*

Let B. M., of &c., be appointed to collect and get in the outstanding personal estate and effects of the testator, and to receive the rents and profits of his real estate in Italy, and any money that may arise from the sale of his real estate in Italy. — “ And let such Receiver, with the approbation of &c., if expedient, appoint a proper person as his agent, living at or near L., or elsewhere in Italy, to collect the said rents and profits, and to receive and get in the (personal) estate and effects of the testator, and to see the same properly secured and transmitted to &c., to be disposed of as this Court shall direct, and, if necessary, to continue the suit now instituted, and to litigate and contest any other suit which may arise (concerning), or have relation to, the testator's estate in Italy ; And let, if necessary, a proper instrument be executed by the defendant, to such person so to be appointed, for the purposes above mentioned, such instrument to be approved of by — judge ” [or court]. — Plaintiff and defendant to deliver over to Receiver all securities, books, and papers ; and he to pass accounts, and pay in balances. *Hinton v. Galli*, (1854) 2 Seton Dec. (Eng. ed. 1862) 1039.

## SECTION V.

## PRODUCTION AND DISCOVERY.

## 1. PRODUCTION AND INSPECTION OF DOCUMENTS.

(a.) *To deposit in court documents admitted by answer.*

It is ordered that the defendant A., within (seven) days after service of this order, produce and leave with the Clerk &c., the several documents mentioned in the answer of the said defendant filed the — day of —, and in the — schedule thereto, and admitted to be in his possession or power, with liberty for the plaintiff, his solicitors and agents, to inspect and peruse the same, and take copies and abstracts thereof, and extracts therefrom, as he shall be advised, at his expense. And the Clerk &c. is to produce the same upon any examination of witnesses in this cause, and at the hearing thereof, as the plaintiff shall require.

*(b.) For inspection thereof out of court (with leave to seal up).*

It is ordered that the plaintiff, his solicitors and agents, be at liberty at all seasonable times, upon giving reasonable notice, to inspect at the office of — [usually the defendant's solicitors), situate at —, the several documents mentioned in the answer of the defendant A., filed the — day of —, and in the schedule thereto, and admitted to be in his possession or power, and to take copies and abstracts thereof, and extracts therefrom, as he shall be advised, at his expense; [but previously to the said inspection, the said defendant is to be at liberty to seal up such parts of the said documents as according to an affidavit to be made by him do not relate to the matters in question in this cause;] And it is ordered that the said defendant produce the said document upon any examination of witnesses in this cause, and at the hearing thereof, as the plaintiff shall require. 2 Seton Dec. (Eng. ed. 1862) 1040.

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2. DELIVERY OUT OF DOCUMENTS.

*(a.) To a party or purchaser.*

It is ordered that (such of) the several documents deposited by &c., with the Clerk &c., pursuant to the order dated &c. (as relate to &c., or are mentioned in the schedule hereto), be delivered out to the plaintiff [or defendant] A. [or to B., the purchaser of the (estate comprised in lot —, part of the) real estates of C., the testator in the pleadings named].

*(b.) To a party's solicitor, to be produced in evidence.*

*(By consent.)* It is ordered that the documents deposited by the defendants with the &c. be delivered out to Mr. —, the defendant's solicitor, for the purpose of producing the same before the (special) examiner appointed to examine witnesses in this cause in the country, the said Mr. — undertaking to re-deposit the same within a week after the examination is closed. Plaintiff to be at liberty to inspect the documents meanwhile. 2 Seton Dec. (Eng. ed. 1862) 1062.

## SECTION VI.

## 1. DECREES PRO CONFESSO.

*(a.) Where defendant does not appear at the hearing.*

This cause coming on &c., in the presence of counsel for the plaintiff [*if there are defendants who appear, add, and for the defendants A. and B.*]; And whereas &c. [*recite shortly the proceedings for obtaining the appearance of the defendant*]; and upon reading the plaintiff's bill duly &c.; and upon hearing what was alleged by the counsel for the plaintiff [*and for the defendants A. and B.*], this Court &c. doth order that the plaintiff's bill be taken *pro confesso* against the said defendant C. And doth order and decree &c.

*(b.) Where defendant appears and waives objections.*

This cause &c.; And the defendant C. now appearing by counsel, and waiving all objections to the order, dated the — day of — [*preliminary order*], and praying to be heard to argue the case upon the merits stated in the bill; This Court &c. 2 Seton Dec. (Eng. ed. 1862) 1128.

## SECTION VII.

## 1. DISMISSAL AT THE HEARING.

*(a.) Dismissal of bill.*

This cause coming on &c., this Court doth order, that the plaintiff's bill do stand dismissed out of this Court [*if there are other defendants who do not appear, or if dismissed against one of several defendants, as against the defendant B.*], with costs to be paid by the plaintiff A. to the said defendant B.; And to be taxed by the &c. (in case the parties differ).

*(b.) As to part of the bill.*

This Court doth order that so much of the plaintiff's bill as seeks &c. do stand dismissed out of this Court, with costs &c.; And as to the rest of the relief sought by the plaintiff's bill &c.; It is ordered &c.

*(c.) With costs as to some defendants, and without costs as to others.*

This Court doth order that the plaintiffs' bill stand dismissed out of this Court, without costs, as against the defendants A. B. &c., and with costs as against the defendants D., E., &c., such costs to be taxed &c., and paid by the plaintiffs (*names*) to the said defendants D., E., &c.

*(d.) Where plaintiff does not appear.*

This cause coming on this day to be heard before this Court &c. [*if set down by defendant*, at the request of the defendant], in the presence of counsel learned for the defendant, no one attending for the plaintiff, although the plaintiff has been served [*or although the plaintiff has been duly served*] with a subpoena to hear judgment in this cause (at the request of the defendant), as by affidavit (now produced) appears, and upon hearing what was alleged by the counsel for the defendant, and upon reading the said affidavit &c. ; This Court doth order, that the plaintiff's bill do stand dismissed out of this Court with costs &c.

*(e.) Dismissal with costs, reasons stated.<sup>1</sup>*

The bill charging the defendants with combining and confederating to wrong and defraud the plaintiffs, as assignees of the estate of the said Joseph Winsor, by making unjust claims against said insolvent, and obtaining payments by preferences, contrary to the provisions of the insolvent laws of Massachusetts, all the material allegations thereof being denied, the evidence of the respective parties being duly taken and published, and the cause brought to hearing, and having been fully argued by counsel ; it is considered, adjudged, and decreed by the Court here, that the claims and demands set up by the defendants in their respective answers, as due from said insolvent, were just and true claims and demands, and that the payment thereof, at the times and in the manner set forth in said answers, and as proved, was not made in violation of the said insolvent laws ; and thereupon the said bill, after full hearing upon the merits of the cause, is adjudged and decreed by the Court to be dismissed with costs for the defendants. [Bigelow *v.* Winsor, 1 Gray, 300.]

*(f.) Dismissal without prejudice ; reasons stated.*

This cause came on to be heard at this term, and was argued by counsel ; and thereupon, upon consideration thereof, it is ordered, adjudged, and de-

<sup>1</sup> See form of such decree in *Troy Iron and Nail Factory v. Corning*, 1 Blatchf. C. C. 474, 475.

creed by the Court, that the plaintiff is entitled to no specific lien or security upon either of the vessels mentioned in the plaintiff's bill, and has no equity to be relieved in respect thereof, and that his bill be dismissed with costs to the defendants, without prejudice to his right to come in and receive a dividend of the said R.'s estate, in common with the other creditors of the said estate. [Hunt v. Rousmanier, 3 Mason, 307.]

*(g.) Dismissal on case agreed.*

"This cause having been submitted upon a case agreed by the parties, and upon the arguments of counsel thereon, as well on the part of the defendants as of the plaintiffs, and due deliberation thereupon had, and it appearing that the plaintiffs are not entitled to the personal estate, either of the late Sir William Pulteney, or of the late Countess of Bath, in the pleadings mentioned, in exoneration of the land from the mortgage debt in question; It is thereupon ordered &c., that the plaintiffs' bill be dismissed, and that no costs be charged by either party as against the other."

*(h.) Dismissal; reasons stated; costs; without prejudice to right to bring another suit.*

"It is declared, that nothing appears to impeach the consideration, or validity of the judgment in the pleadings mentioned, in favor of the defendant H., nor his right and title to the proceeds of the personal estate of the G. Manuf. Co., sold under his execution, and paid to him, nor his right and title to collect the residue of the judgment by the means provided by law; and that the G. Manuf. Co., as well as other debtors, were authorized to give preferences among creditors for a debt justly due. It is therefore ordered &c., that the bill as to the defendant H. be dismissed, with costs. And it is further declared, that the plaintiffs were not entitled, at the time of filing their bill, to question, in this Court, the dispositions of their personal property, inasmuch as, at the time of filing their bill, they had not acquired a lien at law upon the real estate, as judgment creditors, nor have they, as yet, acquired, as execution creditors, a legal preference to the personal property, by means of an execution duly issued and levied or returned, nor shown that they cannot obtain satisfaction of their debt by having tried in vain the ordinary process of such execution at law. And it is further declared, that though the defendants, who are trustees of the said company, and purchased in the personal property of the said company, under the execution of the defendant H., may be liable to have that property redeemed and resold, for the benefit of the creditors seeking the same, after deducting the price they gave, and the just expenses incurred thereon; yet none but an execution creditor at law is entitled to ask for such assistance from this

Court, in respect to the personal estate. It is thereupon further ordered &c., that the bill as to all the other defendants who have answered be dismissed without costs, and without prejudice to the right of the plaintiffs to bring a new suit for the purpose aforesaid in the proper character of judgment executive creditors."

(i.) *Dismissal framed to prevent prejudice.*

Supreme Court of U. States.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of ———, and was argued by counsel; on consideration whereof, this Court is of opinion that the decree of the Circuit Court ought to have shown that the bill was dismissed, because the deed therein mentioned being void at law for matter apparent on its face, the plaintiff had not shown any circumstances which disclosed a case proper for the interference of a Court of Equity to relieve against such void deed. And this Court is further of opinion, that so much of the said decree as dismisses the bill with costs, is erroneous and ought to be reversed. This Court doth therefore reverse and annul the said decree, and direct that the case be remanded to the said Circuit Court with directions to modify the same according to the principles of this decree. 6 Peters U. S. 100, 101.

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SECTION VIII.

1. LEAVE TO ENTER DECREE NUNC PRO TUNC.

Upon motion &c., who alleged that the time for entering the decree [or order] made in this cause, and dated on the ——— day of ———, expired on the ——— day of ———; This Court doth order, that the said decree [or order] be entered *nunc pro tunc*.

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2. REVIVOR AND SUPPLEMENT.

(a.) *Order to revive. [English Form.]*

Upon motion &c., by counsel for the plaintiff, who alleged [*state the last material proceeding in the suit, and the subsequent events in concise form,*] This Court doth order, that this suit, which has become abated in manner aforesaid, stand revived, and be in the same plight and condition as the same was in at the time of the said abatement.

*(b.) Order to revive, on marriage of female sole plaintiff.*

*If no next friend required,* It is ordered that the cause stand revived at the suit of the said A. (*husband*), and the above-named plaintiff, now the wife of the said A., against all the defendants, and be in the same plight &c. *If a next friend required,* It is ordered that this cause stand revived, at the suit of the above-named plaintiff, now the wife of B., by C., of &c., her next friend, against all the defendants, and against the said B., and be in the same plight &c.

*(c.) Order to carry on suit against assignees of bankrupt or insolvent defendant.*

It is ordered that this suit be carried on and prosecuted by the plaintiff against the said M. &c., as such assignees as aforesaid, as if the said defendant had not become bankrupt &c. 2 Seton Dec. (Eng. ed. 1862) 1165.

*(d.) Same ; by committee [or guardian] of plaintiff, a lunatic, before decree.*

It is ordered that A., the committee [or guardian] of the person and estate of the lunatic plaintiff B., be at liberty to carry on and prosecute this suit against the defendants C. &c., in the same manner as the plaintiff B. might have done if he had not so become a lunatic.

## 8. DECREES, ON SUPPLEMENTAL BILL, TO CARRY ON PROCEEDINGS.

*(a.) Decree to carry on proceedings.*

It is ordered that the decree [or order], dated &c., made in the original suit, wherein A. was plaintiff, and C. and D., were defendants, be carried into execution, and the accounts and inquiries, and several other matters thereby directed (and the several proceedings thereunder), be carried on and prosecuted between the parties to this suit, in like manner as thereby directed between the parties to the said original cause ; And it is ordered that the further consideration of this cause be adjourned, in like manner as the further consideration of the said original cause was adjourned by the said decree [or order.]

*(b.) Same ; on supplemental bill in the nature of bill of revivor, though original decree was made after suit abated.*

This Court doth declare, that the plaintiffs are entitled to have the benefit of the proceedings which have been had in the original suit of H. & P.

and others, under the decree made in that suit, dated &c., against the defendants in this suit, who are the executors of R., named as a defendant in the original suit, who died previously to the date of the said decree, as if previously to such decree (a bill had been filed against the executors of the said R., and) an order to revive the said suit had been duly obtained; And doth decree that the said suit and proceedings be carried on accordingly; And adjourn further consideration &c., in like manner as &c. 2 Seton Dec. (Eng. ed. 1862) 1175.

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#### 4. DISPENSING WITH, OR APPOINTING, A REPRESENTATIVE.

[Under 15 & 16 V. c. 86, s. 44.]

##### (a.) *Order to carry on proceedings without a representative.*

Upon motion &c. of counsel for all parties, and upon reading the order dated &c., and an affidavit of &c., whereby it appears that J. and H., two of the grandchildren of G., the testator in the (bill) named, are dead, and that there is no legal personal representative to either of them, this Court doth order, that the proceedings in this cause, and the inquiries and several other matters directed by the order dated &c., be carried on and prosecuted, notwithstanding the absence of any person representing the respective estates of the said J. and H. Gladwin v. Gladwin, (1853) 2 Seton Dec. (Eng. ed. 1862) 1178.

##### (b.) *Order appointing plaintiff to represent deceased plaintiffs.*

Upon motion &c., of counsel for plaintiffs, and upon reading an affidavit of &c., this Court doth order, that the plaintiff W. be appointed to represent the estates of the plaintiffs G. E. &c., respectively deceased, for the purposes of this suit. Vince v. Walsh, (1853) 2 Seton Dec. (Eng. ed. 1862) 1178.

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#### 5. SALES UNDER DECREE OR ORDER.

##### (a.) *Order of sale under Insolvent laws of Massachusetts; application of proceeds to incumbrances; balance of debts, if any, to be proved; surplus of proceeds, if any, to await further order.*

It is ordered, that the assignees of the said A. B. do and they are hereby directed to sell the property and estate in the petition of C. D., and in the petition of E. F., mentioned and described, at public auction, at such time and places on or before the 1st day of December, 1849, as they may think most beneficial to the parties interested therein, first giving twenty

days' notice of such sale, by publishing &c., and the said D. & F. are required and enjoined to join with said assignees in a conveyance of said estate, so as to convey all their respective rights to, and interests therein; Also, that the proceeds thereof be applied, in the first instance, to the extinguishment of said C. D.'s debt in his said petition mentioned, so far as necessary therefor; and that said C. D. be allowed to prove, for such balance, if any, as may remain unpaid; but if a balance [surplus] of said proceeds remain, after payment of the amount of said C. D.'s claim, it is ordered, that said balance [surplus] be applied to the payment and extinguishment of the debt in favor of said E. F., the same being first to be proved and established, and that said E. F. be allowed to prove against said insolvent estate such balance, if any, of his debt, as may remain unpaid; But if any surplus remain of said proceeds, after making said payments, the same to be subject to such order in relation thereto as may hereafter be made. [Hunnewell v. Goodrich, 3 Cush. 471, 472.]

*(b.) Order to pay off legal mortgagees from fund in court, on their conveying.*

. It is ordered, that, upon due execution by M. and S. of the respective conveyances to H. and L. of the real estate comprised in lots 1 and 2 (whereof the said H. and L. have been certified to be the purchasers by &c., dated &c., and which are) now in mortgage to the said M. and S., such execution to be verified by affidavit &c., out of the \$ —, the aggregate amount of the purchase-moneys for the said lots, and being part of the \$ — cash in the &c., to the credit of this cause, the sum of \$ — appearing by the affidavit of &c. to be due to the said M. S. for principal and interest on the security of the said real estate, and also subsequent interest on \$ —, part thereof, at the rate &c., from &c., to the day of payment (the amount of such subsequent interest, and the total amount of principal and interest, to be verified by affidavit), be paid to the said M. and S. — Direction to tax their costs, and for payment thereof out of the cash in Court; Plaintiff to pay purchaser's costs of appearance, and be allowed them in the cause; and plaintiff's and defendant's costs to be costs in the cause. Sutton v. Downing, 2 Seton Dec. (Eng. ed. 1862) 1200.

(c.) *Decree for sale of real estate held as partnership property ; proceeds to discharge mortgages ; and residue to pay debts of copartnership and the copartnership balance to surviving partner, to whom copartnership was indebted ; different parcels sold separately ; any party to be at liberty to bid ; separate accounts to be made of the proceeds of each parcel ; confirming master's report ; letting the purchasers into possession ; order nisi as to infants.*

“ And it is further considered and adjudged by the Court that the said estate near B. street, as well as said estate on C. square and said estate on C. street, ought to be sold under the direction of the Court by a Master, and the proceeds brought into Court first to apply so much thereof as are necessary to discharge the mortgages thereon, and to apply the residue thereof to the discharge of the debts of the copartnership, and the copartnership balance that may be found due to the surviving partner. And the Court doth further order and decree that it be referred to G. T. C., Esquire, one of the Masters of this Court, to cause the said parcel of real estate in C. square, and the said parcel of real estate in C. street, and the said parcel of real estate near B. street, to be separately sold with the approbation of the said Master, at such times and places as he shall think fit, to the best purchaser or purchasers that can be got for the same, to be allowed of by the said Master, wherein all proper parties are to join as the said Master shall direct. And any of the parties are to be at liberty to bid at said sales for all or any of said estates. And it appearing to the Court that the said estates in C. square, and near B. street are incumbered by mortgages or other liens, the said Master is directed to keep and state his accounts, so that it may appear by his report what are the proceeds of each of said parcels of real estate.” [*Confirming Master's Report.*] “ The report of G. T. C., Esq., the Master to whom it was heretofore referred by a decree passed in this cause, to sell the three certain parcels of real estate, having come in and been filed in the clerk's office on the — day of this term, and no exception having been taken thereto ; on motion of Mr. E., the plaintiff's solicitor, it is ordered and decreed that said report do stand confirmed, and that the said M. K. be allowed as the purchaser of said parcel of real estate in C. square, and of said estate near B. street ; and said J. L. be allowed as the purchaser of said parcel of land in C. street, at the prices of said estates respectively reported by said Master as the highest bid therefor.” [*Final Decree.*] “ This cause came on to be further heard at this term for directions as to the final decree, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the report of G. T. C., Esq., the Master to whom it was referred to convey the estates sold under the authority of a former decree in this cause, which report was filed in the clerk's office on the — day of

—, do stand confirmed ; and the said M. K. be let into possession of the said estate on C. square, and the said estate near B. street ; and said J. L. be let into possession of the said estate in C. street. And it is further ordered that the said defendants H. O. H. and S. S. H. respectively do, as and when they shall respectively attain the age of twenty-one years, execute, acknowledge, and deliver sufficient deeds of release of the said estates in C. square, and near B. street, to said M. K., his heirs and assigns, and of the said estate in C. street to said J. L., his heirs and assigns, unless the said H. O. H. and S. S. H., respectively, shall within six months after they shall have respectively attained said age of twenty-one years," [on being served with subpoena to show cause against this decree,] "show unto this Court good cause to the contrary, and in the mean time it is ordered that the said purchasers of said estates, and their respective heirs and assigns, do hold and enjoy the said estates by them respectively purchased, and to them respectively conveyed by said deeds of said Master.

*(d.) Order on plaintiff to pay money ; defendant to release or cancel mortgage ; in default of payment by plaintiff, sale ; money to be paid into court to credit of cause.*

This Court doth order and decree, that the plaintiff shall pay to the defendant the sum of \$ —, with interest from the thirteenth day of June last, within two months from the first day of March now current, less such sums as may have been paid. And upon such payment it is ordered, that the defendant cause to be cancelled or released a mortgage deed on the premises given by him to one E. B. in the pleadings mentioned. And in default of the plaintiff's paying to the defendant what shall be found due as aforesaid, it is ordered that said estate, or a sufficient part thereof, be sold under the direction of one of the Masters of the Court, to the best purchaser or purchasers that can be got for the same, to be allowed of by the said Master, wherein all proper parties are to join as the Master shall direct.

And it is ordered, that the moneys arising from said sale be paid into Court to the credit of this cause, subject to the further order of this Court. And it is ordered that the same be applied in payment of what shall be found due to the defendant for principal and interest as aforesaid. And this Court doth reserve the consideration of all further directions until after said sale and payment. And any of the parties are to be at liberty to apply to the Court as occasion may require.

By the Court,

(Signed)

G. C. W., Clerk.

April 7, 1847.

## SECTION VIII.

## EXECUTION OF DECREES AND ORDERS.

(a.) *Substituted service of decree or order.*

Whereas by the decree [or order] dated &c., it was ordered [*Recite so much of the decree or order as is required to be performed*]; Now upon motion &c., who alleged (*state from affidavit to the effect*) that the plaintiff hath been unable to serve the defendant A. with the said decree [or order], although due diligence hath been used for that purpose, as by the affidavit of B., filed &c., appears; and upon reading the said decree [or order] and affidavit, This Court doth order, that service of the said decree [or order], dated &c., upon —, at — [or upon A. B., C. D., and E. F., members of the firm of Messrs. B., D. & F., of —, or one of them], be deemed good service on the defendant A. 2 Seton Dec. (Eng. ed. 1862) 1212.

(b.) *Order for sequestration on return of attachment. [English.]*

Whereas by the decree [or order] dated &c., it was ordered [*recite so much of the decree or order as is required to be performed*]; Now, upon motion by counsel &c., who alleged that an attachment issued against the defendant A., for his contempt in not &c. [*state the default in respect of which the attachment issued*] directed to the sheriff of —, and that the said sheriff hath returned, that the said defendant is a prisoner in his custody [*or non est inventus* thereof]; and upon reading the said decree [or order], writ and return thereon. This Court doth order that a sequestration do issue, directed to certain commissioners to be therein named, to sequester the said defendant A.'s personal estate, and the rents, profits, and issues of his real estate, until the said defendant shall [*state the act required to be done*] clear his contempt, and this Court doth make other order to the contrary. 2 Seton Dec. (Eng. ed. 1862) 1214.

(c.) *Order to turn over to prison.*

*Where party brought up on attachment, or by habeas.*

The defendant A. being this day brought to the bar of this Court by the &c., attending this Court [*or if brought up by habeas, say, by virtue of a writ of habeas corpus cum causis*, directed to the sheriff of —, or the keeper of the — prison], to answer his contempt in not &c. [*state the default in respect of which the process issued*], and still persisting in his said

contempt. It is upon motion &c. ordered, that the said defendant A. be turned over to the &c. prison, and do remain there until he shall &c. [*state what he is required to do*] clear his contempt, and this Court make other order to the contrary. 2 Seton Dec. (Eng. ed. 1862) 1223.

(d.) *Order for sequestration ; corporation.*

Whereas by the decree [*or order*], dated &c., it was ordered &c. [*recite so much of the decree or order as is required to be performed, or if for non-payment of costs, recite direction as to costs and certificate of taxation*]; Now, upon motion &c., by counsel &c., who alleged that a distringas [*if so add, and an alias and pluries distringas*] issued against the defendants, [*the corporation by their corporate name*] directed to the sheriff of —, for not &c. [*state the default in respect of which the process issues*]; that pursuant to the said decree [*or order*] the said sheriff hath returned *nulla bona* thereon [*or if the sheriff returns issues, say, the sheriff hath returned — issues thereon*]; and upon reading the said decree [*or order*] and certificate of taxation, and the said (*corporation*) still persisting in their said contempt, this Court doth order that a commission of sequestration do issue &c., until they shall [*state what they are required to do*] clear their contempt, and this Court make other order to the contrary; unless the said &c. shall &c., on notice &c.; show cause to the contrary. 2 Seton Dec. (Eng. ed. 1862) 1229.

(e.) *Enforcing return of writ.*

*Order for sheriff to return writ.*

Upon motion &c., by counsel for the plaintiff, who alleged that a writ of attachment issued against the defendant A. for not &c. [*state the contempt for which the writ issued*], returnable on the — day of —, directed to the sheriff of —; and that the said sheriff refuses or has neglected to return the same. This Court doth order that the said sheriff of — do forthwith make his return to the said writ of attachment.<sup>1</sup>

<sup>1</sup> Form of order nisi and absolute. See 2 Seton Dec. (Eng. ed. 1862) 1230.

## CHAPTER XXII.

## MISCELLANEOUS DECREES AND ORDERS.

## 1. LEAVE FOR DEFENDANT TO ENTER APPEARANCE ON RETURN INTRA JUR. AND CONSENTING TO BE BOUND.

Upon motion &c., who alleged that the defendants, other than the defendant A., who was out of the jurisdiction of this Court, having appeared to the plaintiff's bill, a decree has been made, dated &c., directing certain accounts and inquiries to be taken and made, and that the said defendant A. has since returned within the jurisdiction of this Court, and is desirous of attending the proceedings under the said decree; and upon hearing counsel for the plaintiff [or upon reading an affidavit &c., of notice to the plaintiff], and the defendant by his counsel submitting to be bound by the said decree, dated &c., and the several proceedings already had in this cause, this Court doth (by consent) order, that the defendant A. be at liberty to enter an appearance to the plaintiff's bill in this cause, and have the like benefit of the decree, and to attend all subsequent proceedings in this cause, as if he had appeared at the hearing of the same. 2 Seton Dec. (Eng. ed. 1862) 1250.

## 2. ORDER FOR GUARDIAN AD LITEM.

(a.) *Guardian assigned on application of infant or non compos.*

Upon motion &c., who alleged that the said defendant C. is an infant [or a person of unsound mind not so found by inquisition], and that [*name and description of proposed guardian*] is a fit and proper person to be appointed his guardian, and has no interest in this suit adverse to the said infant [or lunatic], as by an affidavit &c. appears; and upon reading the said affidavit, this Court doth order, that the said — be assigned the guardian of the said infant [or lunatic] C., by whom he may defend this suit. 2 Seton Dec. (Eng. ed. 1862) 1250.

(b.) *Another form; infants.*

[U. States C. C.]

In Equity.

C. F. A., Ex'r, v. W. C. J. *et al.*

On this — day of —, it appearing to the Court &c., that M. A. J., L. C. J., and J. Q. A. J., defendants in this suit, are infants under the age

of twenty-one years, it is ordered that R. S. S., Jr., of &c., Esq., be, and he hereby is, appointed guardian *ad litem* of the said J. Q. A. J.; and F. E. P., of &c., Esq., be, and he hereby is, appointed guardian *ad litem* of said M. A. J., and L. C. J.

By the Court.

H. W. F., Clerk.

(c.) *Another form.*

Supreme Judicial Court.

C. G. L., Ex'r, v. L. T. *et al.*

In Equity.

On motion of the plaintiff's solicitor it is ordered, that Mr. A. C. C., a Counsellor of this Court, be appointed guardian *ad litem* of Anna Thorndike *alias* Bayerl, an infant under the age of twenty-one years, one of the defendants to this suit.

By the order of T. M. &c.

February 18, 1862.

### 3. ORDERS FOR LEAVE TO AMEND.

(a.) *Order for leave to amend an injunction bill sworn to, on petition praying for leave to amend the bill, by rectifying such statements as were not within plaintiff's actual knowledge when the bill was drawn, according to what plaintiff now believes to be true, and by omitting such matters as were alleged in the bill on plaintiff's belief only, and are immaterial, and by inserting other matters and charges, as plaintiff should be advised to be material.*

It is hereby ordered, "that the petition of the plaintiff be granted, so far as that she be at liberty, within ——— days, to amend her bill by inserting such additional statements, matters, and charges as she shall be advised are material, and that the same be made without prejudice to the injunction; and that the defendants B. G., J. W., and T. H. answer the exceptions and the amendments together; and that the residue of the prayer of the petition be denied, with liberty, nevertheless, to the plaintiff, at her election, to act under this order, or on or before the first day of the next term, upon payment of the costs of resisting this motion, to renew her motion, upon due notice thereof, to amend, accompanied with an affidavit, stating clearly and precisely the amendments, alterations, and omissions proposed."

(b.) *To withdraw replication and amend.*

Upon motion, &c., and upon hearing counsel for [or reading an affidavit of notice to] the defendant, This Court doth order, that the plaintiff be at liberty to withdraw his replication, and amend his bill filed in this cause, as he may be advised; And it is ordered, that the plaintiff A. do pay to the defendant B. his costs of this suit up to the present time, and also the costs of this application, to be taxed &c. *Champneys v. Buchan*, (1854) 2 Seton Dec. (Eng. ed. 1862) 1253.

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4. ANSWERS.

(a.) *To put in answer in foreign language.*

Upon motion, &c., who alleged that the defendant A. hath appeared to the plaintiff's bill, and that the defendant A. lives at —, and does not understand the English language; This Court doth order, that the said defendant A. be at liberty to swear his answer in the — language, and that —, a notary public, be appointed to translate the same into English, and be sworn to the true translation thereof, and that such translation be filed with the original answer, but notice hereof is first to be given to the plaintiff's solicitor. 2 Seton Dec. (Eng. ed. 1862) 1254.

(b.) *Order on the hearing of exceptions for insufficiency.*

The exceptions taken by the plaintiff to the sufficiency of the defendant to the interrogations filed by the plaintiff for the examination of the said defendant, in answer to the plaintiff's bill, coming on &c., to be argued before this Court, in the presence of counsel for the plaintiff and for the said defendant; and the said exceptions being opened, upon debate of the matter and hearing the defendant's answer, and the said exceptions taken thereto, read, and what was alleged by the council for the plaintiff and for the defendant;

*Allowed.* — This Court held the answer of the defendant to be insufficient in the points excepted to; And doth order, that the said exceptions [do stand and] be allowed. — Direction for payment of costs by defendant, and time to answer, if any:

*Overruled.* — This Court held the answer of the said defendant to be sufficient in the points excepted to; And doth order, that the said exceptions be overruled. — Direction for payment of costs by plaintiff, and liberty to amend, if any:

*Some allowed, others overruled.* — This Court held the answer of the said defendant to be insufficient in the points excepted to by the 1st, 2d, 3d, 4th, and 5th of the said exceptions; And doth order that the said exceptions 1st, 2d, 3d, 4th, and 5th [do stand and] be allowed; And this Court held the answer of the said defendant to be sufficient in the points excepted to by the 6th and 7th of such exceptions; And doth order, that the said 6th and 7th of such exceptions be overruled; And it is ordered, that the costs of the plaintiff and the defendant of all the said exceptions be taxed by &c., who is to certify the amount of five seventh parts of such costs of the plaintiff, and two seventh parts of the said costs of the said defendant, and deduct the said two seventh parts of the said defendant's costs from the amount of the said five seventh parts of the costs of the plaintiff, and certify the balance; and it is ordered, that the said defendant A. do pay to the plaintiff B. the balance so certified. — Time to answer, if any. 2 Seton Dec. (Eng. ed. 1862) 1256.

#### 5. DEMURRER AND PLEA.

##### *Order on hearing demurrer or plea.*

The demurrer [or plea] put in by the defendant to the whole [or part] of the plaintiff's bill coming on &c., to be argued before this Court, in the presence of counsel for the plaintiff and for the defendant [*If so, add, and the said defendant by his counsel demurring orally to the said bill for want of parties*]; upon opening and debate of the matter &c., This Court [*If standing for judgment, add, did order, that the said demurrer (or plea) should stand for judgment, and the same standing &c.*]; *If allowed*, This Court held the said demurrer [or plea] to be good and sufficient, and doth therefore order, that the same do stand and be allowed [*If plaintiff undertakes to reply to plea, And the plaintiff by his counsel undertaking to reply to the said plea, it is ordered, that the costs occasioned by the said plea be costs in the cause*]; and that the plaintiff A. do pay to the said defendant B. his costs of the said demurrer [or plea]; [*If to the whole bill and no liberty to amend given, add, and also his further costs of this suit*], to be taxed by &c. — Liberty to amend, [*If any, and if so, add, but in default of the plaintiff amending his bill within (three weeks) from this date, it is ordered, that the plaintiff A. do pay to the defendant B. his further costs of this suit, to be taxed by &c.*] — *If overruled*, This Court held the said demurrer [or plea] to be insufficient, and doth therefore order that the same be overruled. — Direction as to costs; time to answer, if any. 2 Seton Dec. (Eng. ed. 1862) 1258.

## 6. DEFENDANT OUT OF JURISDICTION.

*(a.) Order for service of bill on defendant out of jurisdiction.*

Upon motion this day made unto this Court by —— of counsel for the plaintiff, it was alleged that the plaintiff has exhibited his bill in this Court, against the defendants A. B., &c., and that they reside at Naples, and that the defendant C. D. resides at Pesth ; it was therefore prayed that the plaintiff may be at liberty to serve a copy of the [printed] bill filed in this cause, and the indorsement thereon, on the defendants A. B., &c., at Naples or elsewhere, and on the defendant at Pesth or elsewhere in Hungary ; and the time within which the said defendants A. B., &c. are to appear to the said bill is to be fourteen days after such service, and the time within which the said last-mentioned defendant C. D. is to appear to the said bill is to be eighteen days after such service. Tripp's Forms, 117.

*(b.) Order for plaintiff to be at liberty to appear for defendant served with bill out of the jurisdiction.*

Whereas by an order, &c., [*Recite the order authorizing service abroad.*] Now, upon motion this day made unto this Court by ——, of counsel for the plaintiff, it was alleged that on the —— day of ——, the said defendant A. B. was duly served at Naples with a [printed] copy of the said bill and the indorsement thereon, and a copy of the said order, as by the affidavit of the plaintiff and an exhibit marked A., being a notarial certificate in the Italian language, of the service of copies of the said bill and duplicate order on the said defendant appears ; but the said defendant A. B. hath not entered an appearance to the said bill, as by the —— clerk's certificate appears ; it was therefore prayed that the plaintiff may be at liberty to enter an appearance to his said bill for the said defendant A. B., which, upon hearing the said order, the notarial certificate, an affidavit of A. E., and certificate read, is ordered accordingly. Tripp's Forms, 118.

*(c.) Order to take bill pro confesso, defendant being out of the jurisdiction.*

Upon motion &c., made &c., by &c., it was alleged that the defendant T. de H., appeared to the plaintiff's bill, but not having put in his answer within the time limited by the Court in that behalf, an attachment was issued against him for want of his answer, directed to the sheriff of ——, who hath returned *non est inventus* thereon ; that it appears by the affidavit of G. R., that the plaintiff is unable with due diligence to procure a writ of attachment for want of his answer to be executed against the de-

fendant, by reason of his being out of the jurisdiction of this Court; that the said defendant hath not put in his answer, as by the — clerk's certificate appears; it was therefore prayed that the plaintiff's bill might be taken *pro confesso* against the said defendant; whereupon, and upon hearing the said affidavit, an affidavit of R. H., an affidavit of J. D. W. of notice of this application to the defendant, and the said certificate read, this Court doth order that the clerk &c., do attend on the — day of — next, with the record of the plaintiff's bill, in order that the same may be taken *pro confesso* against the said defendant F. de H. And it is ordered, that this order be served upon the said defendant. Tripp's Forms, 121.

# **RULES OF PRACTICE**

**FOR THE**

**COURTS OF EQUITY OF THE UNITED STATES.**



# **RULES OF PRACTICE**

**FOR THE**

**COURTS OF EQUITY OF THE UNITED STATES,**

**PROMULGATED BY THE SUPREME COURT OF THE UNITED STATES,  
JANUARY TERM, 1842.**

**AND**

**THE ADDITIONAL RULES AND AMENDMENTS OF RULES ADOPTED  
AND PROMULGATED SINCE THAT TIME.**

## **PRELIMINARY REGULATIONS.**

### **I.**

The Circuit Courts, as Courts of Equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

### **II.**

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

### **III.**

Any Judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on rule days, at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the Judge for the hearing.

## IV.

All motions, rules, orders, and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits, to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the Judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings, not requiring personal service on the parties, in their discretion.

## V.

All motions and applications in the Clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require any allowance or order of the Court, or of any Judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the Court. But the same may be suspended, or altered, or rescinded, by any Judge of the Court, upon special cause shown.

## VI.

All motions for rules or orders, and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a Judge of the Court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any Judge of the Court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

## PROCESS.

## VII.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer to the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the Court.

## VIII.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the Court or of a Judge thereof, upon motion and affidavit enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

## IX.

When any decree or order is for the delivery of possession, upon proof made by affidavit, of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the Court.

## X.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order, as if he were a party in the cause.

## SERVICE OF PROCESS.

## XI.

No process of subpoena shall issue from the clerk's office in any suit in equity, until the bill is filed in the office.

## XII.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable: otherwise, the bill may be taken *pro confesso*. When there are more than one defendants, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife, defendants, or a joint subpoena against all the defendants.

## XIII.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.

## XIV.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

## XV.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the Court for that purpose, and not otherwise; in the latter case, the person serving the process shall make affidavit thereof.

## XVI.

Upon the return of the subpoena, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the Court, and shall state the time of the entry.

## APPEARANCE.

## XVII.

The appearance day of the defendant shall be the rule day, to which the subpoena is made returnable ; provided, he has been served with the process twenty days before that day ; otherwise, his appearance day shall be the next rule day succeeding the rule day, when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

## BILLS TAKEN PRO CONFESSO.

## XVIII.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the Court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance ; in default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso* ; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the Court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed ; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer ; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless, upon filing his answer, or otherwise complying with such order as the Court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the Court or judge, and undertaking to speed the cause.

## XIX.

When the bill is taken *pro confesso*, the Court may proceed to a decree at the next ensuing term thereof, and such decree rendered shall be deemed absolute, unless the Court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the Court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the Court shall direct, and submit to such other terms as the Court shall direct, for the purpose of speeding the cause.

## FRAME OF BILLS.

## XX.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs, and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United States for the District of ——. A. B., of ——, and a citizen of the State of ——, brings this, his bill, against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——, and thereupon your orator complains and says, that &c."

## XXI.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses, which the defendant is supposed to intend to set up by way of defence to the bill; also, what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing, which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief, to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction or a writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for.

## XXII.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the Court, or that they cannot be joined without ousting the jurisdiction of the Court as to the other parties. And as to persons who are without the jurisdiction, and may properly be made parties, the bill may pray that process may issue to make them parties to the bill, if they should come within the jurisdiction.

## XXIII.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact so that the Court may take order thereon as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

## XXIV.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

## XXV.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State Court of Chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

## SCANDAL AND IMPERTINENCE IN BILLS.

## XXVI.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a Master by any Judge of the Court for impertinence or scandal, and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the Court, or a Judge thereof, shall otherwise order. If the Master shall report that the bill is not scandalous or impertinent, the defendant [plaintiff] shall be entitled to all costs occasioned by the reference.

## XXVII.

No order shall be made by any Judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the Court for scandal or impertinence unless exceptions are taken in writing, and signed

by counsel, describing the particular passages which are considered scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day, after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the Master to examine and report for the same on or before the next succeeding rule day, or the Master shall certify that further time is necessary for him to complete the examination.

#### AMENDMENTS OF BILLS.

### XXVIII.

The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point, (as he may do of course,) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole bill as amended, and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

### XXIX.

After an answer or plea or demurrer is put in, and before replication, the defendant may, upon motion or petition, without notice, obtain an order from any Judge of the Court, to amend his bill on or before the next succeeding rule day, upon payment of costs, or without payment of costs, as the Court or a Judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a Judge of the Court, upon motion or petition, after due notice to the other party, and upon proof by affidavit, that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the Judge for amending the cause.

## XXX.

If the plaintiff, so obtaining any order to amend his bill after answer or plea or demurrer, or after replication, shall not file his amendments or amended bill as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed, as if no application for any amendment had been made.

## DEMURRERS AND PLEAS.

## XXXI.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay ; and if a plea, that it is true in point of fact.

## XXXII.

The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the Court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue ; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

## XXXIII.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

## XXXIV.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the Court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the Court, be reasonably done ; in default whereof, the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

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If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the Court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the Court, be reasonably done; in default whereof, the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

## XXXV.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the Court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

## XXXVI.

No demurrer or plea shall be held bad, and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

## XXXVII.

No demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

## XXXVIII.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day, when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a Judge of the Court shall allow him further time for the purpose.

## ANSWERS.

## XXXIX.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply, in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

## XL.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.<sup>1</sup>

## XLI.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c."; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

## XLII.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

## XLIII.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words, "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:—

"1. Whether &c."

"2. Whether &c."

<sup>1</sup> This rule was repealed and annulled December Term, 1850. See 130th Rule.

## XLIV.

A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

## XLV.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the Court, or a Judge thereof, may in his discretion direct.

## XLVI.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time therefor is enlarged or otherwise ordered by a Judge of the Court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

## PARTIES TO BILLS.

## XLVII.

In all cases where it shall appear to the Court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the Court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the Court as to the parties before the Court, the Court may in their discretion proceed in the cause without making such persons parties; and in such cases, the decree shall be without prejudice to the rights of the absent parties.

## XLVIII.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

## XLIX.

In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate or rents and profits parties to the suit; but the Court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

## L.

In suits to execute the trusts of a bill, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party, where he desires to have the will established against him.

## LI.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

## LII.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the Clerk's order book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled, as of course, to an order for liberty to amend his bill by adding parties. But the Court, if it thinks fit, shall be at liberty to dismiss the bill.

## LIII.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

## NOMINAL PARTIES TO BILLS.

## LIV.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the Court shall otherwise direct.

## LV.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the Court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the Court, or until it is dissolved by some other order of the Court.

## BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

## LVI.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of

the facts, the proper process or subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

## LVII.

Whenever any suit in equity shall become defective, from any event happening after the filing of the bill (as, for example, by a change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the Court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the Court.

## LVIII.

It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

## ANSWERS.

## LIX.

Every defendant may swear to his answer before any justice or judge of any Court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any Master in chancery appointed by any Circuit Court, or before any judge of any Court of a State or Territory.

## AMENDMENT OF ANSWERS.

## LX.

After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or de-

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may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

### CROSS BILL.

#### LXXII.

Where a defendant in equity files a cross bill for discovery only against plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill, at the hearing, in the same manner and under the same restrictions as the answer, praying relief, may now be read and used.

### REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

#### LXXIII.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the Master, to whom it is referred to take the same, to inquire and state to the Court what parts, if any, of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct.

#### LXXIV.

Whenever any reference of any matter is made to a Master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the Master for a report on or before the next rule day succeeding the time when the reference is made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the Master, at the instance of the party procuring the reference.

#### LXXV.

In every such reference it shall be the duty of the Master, as soon as conveniently can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the Master shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the examination and proceedings to some future day, giving notice to the absent party or his solicitor, of the adjournment; and it shall be the duty of the Master to proceed with the same with able diligence in every such reference, and with the least practi-

cable delay; and either party shall be at liberty to apply to the Court or a Judge thereof for an order to the Master to speed the proceedings, and to make his report, and to certify to the Court or Judge the reasons for any delay.

#### LXXVI.

In the reports made by the Master to the Court, no part of any state of facts, charge, affidavit, deposition, examination or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

#### LXXVII.

The Master shall regulate all the proceedings in every hearing before him, upon every such reference, and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the Clerk's office, or by deposition according to the acts of Congress or otherwise as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

#### LXXVIII.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a Master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, Master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in Court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the Court, which being certified to the clerk's office by the commissioner, Master, or examiner, an attachment may issue thereupon by order of the Court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the Court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open Court, if the Court shall in its discretion deem it advisable.

## LXXIX.

All parties accounting before a Master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the Master's office, or by deposition, as the Master shall direct.

## LXXX.

All affidavits, depositions, and documents which have been previously made, read, or used in the Court, upon any proceeding in any cause or matter, may be used before the Master.

## LXXXI.

The Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the Master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the Court, if necessary.

## LXXXII.

The Circuit Courts may appoint standing Masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a Master *pro hac vice* in any particular case. The compensation to be allowed to every Master in chancery for his services in any particular case shall be fixed by the Circuit Court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the Court shall direct. The Master shall not retain his report as security for his compensation; but when the compensation is allowed by the Court, he shall be entitled to an attachment for the amount against the party, who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the Court.

## EXCEPTIONS TO REPORT OF MASTER.

## LXXXIII.

The Master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that

period filed by either party, the report shall stand confirmed on the next rule day after the month has expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session, or if not, then at the next sitting of the Court which shall be held thereafter by adjournment or otherwise.

## LXXXIV.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs, — the costs to be fixed in each case by the Court, by a standing rule of the Circuit Court.

## DECREES.

## LXXXV.

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the Court or a judge thereof, upon petition, without the form or expense of a rehearing.

## LXXXVI.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any Master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.: [Here insert the decree or order.]

## GUARDIANS AND PROCHEIN AMIS.

## LXXXVII.

Guardians *ad litem* to defend a suit may be appointed by the Court, or by any judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the Court may direct for the protection of infants and other persons.

## LXXXVIII.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the

facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the Court, in the discretion of the Court.

### LXXXIX.

The Circuit Courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

### XC.

In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

### XCI.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

### XCII.

These rules shall take effect, and be of force, in all the Circuit Courts of the United States, from and after the first day of August next; but they may be previously adopted by any Circuit Court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the Rules of Practice for the Circuit Courts in Equity suits, promulgated and prescribed by this Court in March, 1822, shall henceforth cease, and be of no further force or effect. And the Clerk of this Court is directed to have these rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several Courts of the United States, and to each of the judges thereof.

### XCIII.

(December Term, 1850.)

Ordered that the fortieth rule, heretofore adopted and promulgated by this Court as one of the rules of practice in suits in equity in the Circuit

Courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

## XCIV.

(December Term, 1854.)

Amendment of the 67th Rule.

Ordered, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any Court exercising jurisdiction, either in term time or vacation, to vest in the clerk of said Court general power to name commissioners to take testimony in like manner that the Court or judge thereof can now do by the said 67th rule.

Test :

Wm. Thos. Carroll, C. S. C. U. S.

## XCV.

Amendment of the 67th Rule. In Equity. Monday, March 17, 1862. Ordered, That the last paragraph in the 67th rule in equity be repealed and that the rule be amended as follows : —

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the Court, or before an examiner to be specially appointed by the Court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors; and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be, in the mode now used in common-law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner, in the form of narrative, unless he determines the examination shall be by question and answer, in special instances, and when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the Court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the Court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

The compulsory attendance of witnesses, in case of refusal to attend in

be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses, to be produced on examination before an examiner of said Court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the Court, to be there filed of record in the same mode as prescribed in the thirtieth section of Act of Congress, September 24, 1789.

Testimony may be taken on commission, in the usual way, by written interrogatories and cross-interrogatories, on motion to the Court, in term time, or to a Judge in vacation, for special reasons satisfactory to Court or Judge.<sup>1</sup>

### XCVI.

April 18th, 1864. In suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any of the Courts of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this Court regulating equity practice, where the decree is solely for the payment of money.

*Rules for the U. States Supreme Court, Dec. T., 1858, affecting equity practice.*

#### No. 3.

This Court consider the practice of the Court of King's [Queen's] Bench and of Chancery, in England, as affording outlines for the practice of this Court; and they will from time to time make such alterations therein as circumstances may render necessary.

#### No. 5.

All process in this Court shall be in the name of the President of the United States.

When process at common law or in equity shall issue against a State,

<sup>1</sup> 1 Black U. S. Rep. 6, 7.

fences, or qualifying or altering the original statements, except by special leave of the Court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the Court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

#### EXCEPTIONS TO ANSWERS.

##### LXI.

After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the Court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

##### LXII.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a Master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

##### LXIII.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the Court; and shall enter, as of course, in the order book an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned and the answer shall be deemed sufficient; provided, however, that the Court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

##### LXIV.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto, on the next succeeding

rule day ; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions ; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the Court, or of a judge thereof, upon his putting in such answer and complying with such other terms, as the Court or judge may direct.

## LXV.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the Court, or the judge thereof, at the hearing upon the exceptions.

## REPLICATION AND ISSUE.

## LXVI.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter ; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit, and the suit shall thereupon stand dismissed, unless the Court or a Judge thereof shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

## TESTIMONY, HOW TAKEN.

## LXVII.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties or severally by either party, upon interrogatories filed by the party, taking out the same in the Clerk's office, ten days' notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission, and if no cross interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the Court or by a Judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.<sup>1</sup>

<sup>1</sup> Amended in Rules XCIV. and XCV., post.

## LXVIII.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness either under a commission or by a new deposition taken under the acts of Congress, if a Court or a Judge thereof shall, under all the circumstances, deem it reasonable.

## LXIX.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the Court or a Judge thereof shall, upon special cause shown by either party, enlarge the time, and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony, into the Clerk's office, publication thereof may be ordered in the Clerk's office by any Judge of the Court, upon due notice to the parties or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass in the Clerk's office, such consent being in writing, and a copy thereof entered in the order book, or indorsed upon the deposition or testimony.

## TESTIMONY DE BENE ESSE.

## LXX.

After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a material fact, the Clerk of the Court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a Judge of the Court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

## FORM OF THE LAST INTERROGATORY.

## LXXI.

The last interrogatory, in the written interrogatories to take testimony now commonly in use, shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth any other matter or thing, which

may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

#### CROSS BILL.

#### LXXII.

Where a defendant in equity files a cross bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill, at the hearing, in the same manner and under the same restrictions as the answer, praying relief, may now be read and used.

#### REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

#### LXXIII.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the Master, to whom it is referred to take the same, to inquire and state to the Court what parts, if any, of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct.

#### LXXIV.

Whenever any reference of any matter is made to a Master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the Master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the Master, at the costs of the party procuring the reference.

#### LXXV.

Upon every such reference it shall be the duty of the Master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the Master shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor, of such adjournment; and it shall be the duty of the Master to proceed with all reasonable diligence in every such reference, and with the least practi-

cable delay ; and either party shall be at liberty to apply to the Court or a Judge thereof for an order to the Master to speed the proceedings, and to make his report, and to certify to the Court or Judge the reasons for any delay.

#### LXXVI.

In the reports made by the Master to the Court, no part of any state of facts, charge, affidavit, deposition, examination or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

#### LXXVII.

The Master shall regulate all the proceedings in every hearing before him, upon every such reference, and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference ; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto ; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the Clerk's office, or by deposition according to the acts of Congress or otherwise as hereinafter provided ; and also to direct the mode in which the matters requiring evidence shall be proved before him ; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

#### LXXVIII.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a Master or examiner appointed in any cause by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, Master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in Court ; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the Court, which being certified to the clerk's office by the commissioner, Master, or examiner, an attachment may issue thereupon by order of the Court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the Court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open Court, if the Court shall in its discretion deem it advisable.

## LXXIX.

All parties accounting before a Master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the Master's office, or by deposition, as the Master shall direct.

## LXXX.

All affidavits, depositions, and documents which have been previously made, read, or used in the Court, upon any proceeding in any cause or matter, may be used before the Master.

## LXXXI.

The Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the Master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the Court, if necessary.

## LXXXII.

The Circuit Courts may appoint standing Masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a Master *pro hac vice* in any particular case. The compensation to be allowed to every Master in chancery for his services in any particular case shall be fixed by the Circuit Court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the Court shall direct. The Master shall not retain his report as security for his compensation; but when the compensation is allowed by the Court, he shall be entitled to an attachment for the amount against the party, who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the Court.

## EXCEPTIONS TO REPORT OF MASTER.

## LXXXIII.

The Master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that

period filed by either party, the report shall stand confirmed on the next rule day after the month has expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session, or if not, then at the next sitting of the Court which shall be held thereafter by adjournment or otherwise.

#### LXXXIV.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs, — the costs to be fixed in each case by the Court, by a standing rule of the Circuit Court.

#### DECREES.

#### LXXXV.

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the Court or a judge thereof, upon petition, without the form or expense of a rehearing.

#### LXXXVI.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any Master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.: [Here insert the decree or order.]"

#### GUARDIANS AND PROCHEIN AMIS.

#### LXXXVII.

Guardians *ad litem* to defend a suit may be appointed by the Court, or by any judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the Court may direct for the protection of infants and other persons.

#### LXXXVIII.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the

facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the Court, in the discretion of the Court.

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The Circuit Courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

## XC.

In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

## XCI.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

## XCII.

These rules shall take effect, and be of force, in all the Circuit Courts of the United States, from and after the first day of August next; but they may be previously adopted by any Circuit Court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the Rules of Practice for the Circuit Courts in Equity suits, promulgated and prescribed by this Court in March, 1822, shall henceforth cease, and be of no further force or effect. And the Clerk of this Court is directed to have these rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several Courts of the United States, and to each of the judges thereof.

## XCIII.

(December Term, 1850.)

Ordered that the fortieth rule, heretofore adopted and promulgated by this Court as one of the rules of practice in suits in equity in the Circuit

period filed by either party, the report shall stand confirmed on the next rule day after the month has expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session, or if not, then at the next sitting of the Court which shall be held thereafter by adjournment or otherwise.

#### LXXXIV.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs, — the costs to be fixed in each case by the Court, by a standing rule of the Circuit Court.

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#### LXXXV.

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Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the

be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses, to be produced on examination before an examiner of said Court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the Court, to be there filed of record in the same mode as prescribed in the thirtieth section of Act of Congress, September 24, 1789.

Testimony may be taken on commission, in the usual way, by written interrogatories and cross-interrogatories, on motion to the Court, in term time, or to a Judge in vacation, for special reasons satisfactory to Court or Judge.<sup>1</sup>

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April 18th, 1864. In suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any of the Courts of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this Court regulating equity practice, where the decree is solely for the payment of money.

*Rules for the U. States Supreme Court, Dec. T., 1858, affecting equity practice.*

#### No. 3.

This Court consider the practice of the Court of King's [Queen's] Bench and of Chancery, in England, as affording outlines for the practice of this Court; and they will from time to time make such alterations therein as circumstances may render necessary.

#### No. 5.

All process in this Court shall be in the name of the President of the United States.

When process at common law or in equity shall issue against a State,

<sup>1</sup> 1 Black U. S. Rep. 6, 7.

Courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

## XCIV.

(December Term, 1854.)

Amendment of the 67th Rule.

Ordered, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any Court exercising jurisdiction, either in term time or vacation, to vest in the clerk of said Court general power to name commissioners to take testimony in like manner that the Court or judge thereof can now do by the said 67th rule.

Test :

Wm. Thos. Carroll, C. S. C. U. S.

## XCV.

Amendment of the 67th Rule. In Equity. Monday, March 17, 1863. Ordered, That the last paragraph in the 67th rule in equity be repealed and that the rule be amended as follows : —

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the Court, or before an examiner to be specially appointed by the Court. The examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors; and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be, in the mode now used in common-law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner, in the form of narrative, unless he determines the examination shall be by question and answer, in special instances, and when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend. Provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the Court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the Court shall have power to deal with the costs of incompetent, immaterial & irrelevant depositions, or parts of them, as may be just.

The compulsory attendance of witnesses, in case of refusal to attend

be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses, to be produced on examination before an examiner of said Court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the Court, to be there filed of record in the same mode as prescribed in the thirtieth section of Act of Congress, September 24, 1789.

Testimony may be taken on commission, in the usual way, by written interrogatories and cross-interrogatories, on motion to the Court, in term time, or to a Judge in vacation, for special reasons satisfactory to Court or Judge.<sup>1</sup>

#### XCVI.

April 18th, 1864. In suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any of the Courts of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this Court regulating equity practice, where the decree is solely for the payment of money.

*Rules for the U. States Supreme Court, Dec. T., 1858, affecting equity practice.*

#### No. 3.

This Court consider the practice of the Court of King's [Queen's] Bench and of Chancery, in England, as affording outlines for the practice of this Court; and they will from time to time make such alterations therein as circumstances may render necessary.

#### No. 5.

All process in this Court shall be in the name of the President of the United States.

When process at common law or in equity shall issue against a State,

<sup>1</sup> 1 Black U. S. Rep. 6, 7.

the same shall be served on the Governor, or Chief Executive Magistrate, and Attorney-General, of such State.

Process of subpoena, issuing out of the Court in any suit in equity, shall be served on the defendant sixty days before the return day of said process; and if the defendant, on such service of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

No. 12.

In all cases where further proof is ordered by the Court, the deposition which shall be taken shall be by a commission to be issued from this Court, or from any Circuit Court of the United States.

No. 13.

In all cases of equity and admiralty jurisdiction heard in this Court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record, as evidence, unless objection was taken thereto in the Court below, and entered of record, but the same shall otherwise be deemed to have been admitted by consent.

**ENGLISH SYSTEM OF ADDUCING AND TAKING EVIDENCE,—  
ORAL EXAMINATIONS AND AFFIDAVITS,—AS REGULATED  
BY 15 AND 16 VICT. c. 86, ss. 38–41, AND BY GENERAL ORDERS  
OF 5TH FEB., 1861.<sup>1</sup>**

By the 15 and 16 Vict. c. 86, ss. 38–41, the former mode of examining witnesses in causes, and the practice of the Court in relation thereto, was abolished, except where the Court should specially direct any witness to be examined on interrogatories; and the mode of adducing and taking evidence orally, or by affidavit, was prescribed. By s. 39, upon the hearing of any cause, the Court was empowered to require the production and oral examination before itself of any witness or party in the cause. And by s. 40, any party in any cause or matter was enabled by subpoena *ad testificandum* or *duces tecum* to require the attendance of any witness before the examiner, and examine him orally for the purpose of using his evidence on any claim, motion, or petition; and any party having made an affidavit to be used thereon may be cross-examined. By s. 41, the evidence subsequent to the hearing is to be taken as nearly as may be in the same manner as prior to the hearing.

By General Orders of 5th Feb., 1861, Rule 1, the course of proceeding prescribed by the 15 & 16 Vict. c. 86, as to the mode of examining witnesses and taking evidence, and the practice relating thereto, are altered as follows, but not further or otherwise.

By Rule 3, in any cause in which issue is joined, the plaintiff or any defendant may at any time within 14 days after issue joined, apply to the Judge in chambers, by summons to be served on the opposite party, for an order that the evidence in chief as to any facts or issues (such facts and issues to be distinctly and concisely specified in the summons) may be taken *viva voce* at the hearing of the cause; and the Judge may make an order that the evidence in chief as to such facts and issues, or any of them, shall be taken *viva voce* at the hearing accordingly; and the facts and issues as to which any such order shall direct that the evidence in chief shall be taken *viva voce* at the hearing, shall be distinctly and concisely specified in such order; but in case the Judge shall be satisfied that such applica-

<sup>1</sup> 1 Seton Dec. (Eng. ed. 1862) 9–13.

**XXX      ENGLISH RULES FOR TAKING EVIDENCE IN CHANCERY.**

tion is unreasonable, or made for the purpose of delay, oppression, or vexation, he may refuse to make any such order ; and where any such order shall have been made, the examination in chief, as well as the cross-examination and re-examination, shall be taken before the Court at the hearing as to the facts and issues specified in such order ; And no affidavit or evidence taken before an examiner shall be admissible at the hearing of any such cause in respect of any fact or issue which shall be included in any such order as aforesaid.

By Rule 4, save as aforesaid, and save in the case mentioned in the Rule 11, it shall not be competent to the plaintiff or any defendant to require, by notice or otherwise, that the evidence in chief to be used at the hearing of a cause shall be taken orally. But except as to facts or issues included in any order directing evidence in chief to be taken *vis à rect* at the hearing under Rule 3, each party in a cause in which issue is joined shall be at liberty to verify his case either wholly or partially by affidavit or wholly or partially by the oral examination of witnesses *ex parte* before one of the examiners of the Court, or before a special examiner in the manner prescribed by Rule 6.

By Rule 5, the evidence in chief on both sides in any cause in which issue is joined, to be used at the hearing thereof, in respect of facts and issues not included in any order for taking evidence in chief *vis à rect* at the hearing under the Rule 3, shall, whether taken by affidavit or before an examiner (and including the cross-examination and re-examination of any witness or other person under Rules 10 and 11), be closed within eight weeks after issue joined, unless the time be enlarged by special order.

By Rule 6, except in the cases mentioned in Rules 10, 11, 16, and 17, all examinations taken by the examiners of the Court, or by any special examiner, for the purpose of being used at the hearing of a cause in which issue is joined, shall be taken *ex parte*, and no person shall have a right to be present at the taking of any such an examination except the party producing the witness, his counsel, solicitor, and agents ; and every examination so taken *ex parte* shall be deemed to be an affidavit, and the examiner, before transmitting the same to the Clerks of Record and Writ office to be filed, shall mark the same as taken *ex parte*, and the Record and Writ Clerks shall deal with the same as an affidavit.

By Rule 7, except in the cases mentioned in Rules 10, 11, 16, and 17, no cross-examination of any deponent or witness, or of any party to be used at the hearing of a cause in which issue is joined, shall be taken otherwise than before the Court at the hearing.

Rule 8 provides for setting down the cause, where under Rule 3 the evidence in chief has been ordered to be taken *viva voce*. The Registrars in setting down the cause are to mark it, to indicate that the evidence in chief is ordered to be taken *viva voce* at the hearing; and the cause is not to come on without special direction, to be obtained on application to the Court by either party on notice to have a day fixed for the hearing.

By Rule 9, where such order as mentioned in Rule 3 has been made, each party shall be at liberty to sue out, at the Record and Writ Office, subpoenas *ad testificandum* and *duces tecum*, to compel the attendance at the hearing of witnesses whom he may desire to produce on any issue or matter of fact included in such order, according to the forms now in use, varied as the case shall require.

By Rule 10, notwithstanding any of the preceding rules, if at any time after issue joined the parties shall, by writing signed by them or their respective solicitors, and filed at the Record and Writ Office, agree that the oral examination in chief and cross-examination of any witness or witnesses (whether a party or parties or not) or the cross-examination of any person or persons who shall have made an affidavit or affidavits, or who shall have been examined *ex parte* before an examiner, shall be taken before one of the examiners of the Court or a special examiner, in manner provided by the 15 & 16 Vict. c. 86 (ante, Vol. II. pp. 888, 889), such examination may be taken accordingly; and in case, by virtue of any such agreement, any witness or person shall be examined in chief before the examiner or special examiner, the cross-examination and re-examination of such witness or person shall be taken before the same examiner or special examiner, or his successor in office; and the cross-examination of every witness so examined in chief shall immediately follow his examination in chief, and the re-examination of every witness or person so cross-examined shall immediately follow his cross-examination.

By Rule 11, notwithstanding any of these rules, the Court or the Judge in Chambers may direct that the oral examination and cross-examination of any witness (whether a party or not), or the cross-examination of any person who has been examined *ex parte* before an examiner, or made an affidavit, shall be taken before an examiner of the Court or a special examiner, in the manner prescribed by the 15 & 16 Vict. c. 86 (ante, Vol. II. pp. 888, 889), as if these rules had not been made, in case it shall appear to the Judge that, owing to the age, infirmity, or absence out of the jurisdiction of such witness or person, or for any other cause which to the Judge shall appear sufficient, it is expedient that such direction should be given. Such direction may be obtained on application to the Court or the Judge in Chambers, on notice.

witness, and the time and place of such examination or cross-examination, unless the Court shall in any case think fit to dispense with such notice.

By Rule 23, each statement in an affidavit, which is to be used as evidence at the hearing of a cause or matter, or of a motion for a decree or other motion, or on any other proceeding before the Court, or before the Judge in chambers, shall show the means of knowledge of the person making such statement.<sup>1</sup>

By Rule 24, in all causes and matters to which any infant, married woman, person of unsound mind, whether found so by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence, or of any other procedure, shall, if given with the sanction of the Court, or of the Judge in chambers, by the next friend, guardian, committee, or other person acting on behalf of the person under such disability, have the same force and effect as if such party were under no disability, and had given such consent: Provided, that no such consent by any committee of a lunatic shall be valid as between him and the lunatic, unless given with the sanction of the Lord Chancellor or Lords Justices sitting in lunacy.

By Rule 25, these rules come into operation on the 1st day of Easter Term, 1861; and the general interpretation clause in the consolidated orders extends to them.

After the time for closing the evidence has expired, the Court would only extend it under special circumstances; neither party need file his affidavits till just before the time expires; *Thompson v. Partridge*, 4 D. M. G. 794; but defendants were allowed to file affidavits in answer to specific charges made in affidavits filed immediately before; *Scott v. Corp. of Liverpool*, 1 D. & J. 369; and where plaintiff was allowed, under special circumstances, to read an affidavit filed after the time, reserving the right to cross-examine, see *Hope v. Threlfall*, 1 S. & G. xxi.

And for the practice as to preparing, swearing, filing, and making copies of affidavits, see *Ayck.* 284; *Smith*, 411-2; *Consolidated Orders*, 18; *Morg.* xcix.; And as to erasures in pleas, answers, or affidavits, see *Consolidated Orders*, 1, Rule 36; *Gill v. Gillbard*, 9 Hare, xvi. As to the mode of returning depositions, see *Clark v. Gill*, 1 K. & J. 19.

<sup>1</sup> See *Bird v. Lake*, 1 Hem. & Miller, 111; *ante*, Vol. II. p. 394.

## LXXIX.

All parties accounting before a Master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the Master's office, or by deposition, as the Master shall direct.

## LXXX.

All affidavits, depositions, and documents which have been previously made, read, or used in the Court, upon any proceeding in any cause or matter, may be used before the Master.

## LXXXI.

The Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the Master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the Court, if necessary.

## LXXXII.

The Circuit Courts may appoint standing Masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a Master *pro hac vice* in any particular case. The compensation to be allowed to every Master in chancery for his services in any particular case shall be fixed by the Circuit Court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the Court shall direct. The Master shall not retain his report as security for his compensation; but when the compensation is allowed by the Court, he shall be entitled to an attachment for the amount against the party, who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the Court.

## EXCEPTIONS TO REPORT OF MASTER.

## LXXXIII.

The Master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that

period filed by either party, the report shall stand confirmed on the next rule day after the month has expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session, or if not, then at the next sitting of the Court which shall be held thereafter by adjournment or otherwise.

## LXXXIV.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs, — the costs to be fixed in each case by the Court, by a standing rule of the Circuit Court.

## DECREES.

## LXXXV.

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the Court or a judge thereof, upon petition, without the form or expense of a rehearing.

## LXXXVI.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any Master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.: [Here insert the decree or order.]

## GUARDIANS AND PROCHEIN AMIS.

## LXXXVII.

Guardians *ad litem* to defend a suit may be appointed by the Court, or by any judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the Court may direct for the protection of infants and other persons.

## LXXXVIII.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the

facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the Court, in the discretion of the Court.

### LXXXIX.

The Circuit Courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

### XC.

In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

### XCI.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

### XCII.

These rules shall take effect, and be of force, in all the Circuit Courts of the United States, from and after the first day of August next; but they may be previously adopted by any Circuit Court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the Rules of Practice for the Circuit Courts in Equity suits, promulgated and prescribed by this Court in March, 1822, shall henceforth cease, and be of no further force or effect. And the Clerk of this Court is directed to have these rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several Courts of the United States, and to each of the judges thereof.

### XCIII.

(December Term, 1850.)

Ordered that the fortieth rule, heretofore adopted and promulgated by this Court as one of the rules of practice in suits in equity in the Circuit

Courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

## XCIV.

(December Term, 1854.)

Amendment of the 67th Rule.

Ordered, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any Court exercising jurisdiction, either in term time or vacation, to vest in the clerk of said Court general power to name commissioners to take testimony in like manner that the Court or judge thereof can now do by the said 67th rule.

Test :

Wm. Thos. Carroll, C. S. C. U. S.

## XCV.

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be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses, to be produced on examination before an examiner of said Court on written interrogatories.

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<sup>1</sup> 1 Black U. S. Rep. 6, 7.

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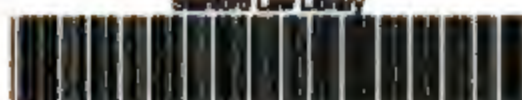
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